85-1216

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHN D. O'CONNELL
Petitioner,

v.

MARYLAND STEEL ERECTORS, INC., et al
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the "Longshore and Harbor Workers' Compensation Act Amendments of 1984" are applicable to Workers' Compensation claims governed by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq., as made applicable to the District of Columbia by virtue of D.C. Code §§ 36-501 et seq (1973).

2. Whether the application of the Longshore and Harbor Workers' Compensation Act Amendments of 1984 cure the "lack of Standing" defect that caused dismissal of the action.

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IN THE

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OCTOBER TERM, 1985

No. _____

JOHN D. O'CONNELL
Petitioner,

v.

MARYLAND STEEL ERECTORS, INC., et al
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the Decision and Order of the District of Columbia Court of Appeals dismissing Petitioner's appeal from an Order of Summary Judgment and denying a Petition for Rehearing and/or Suggestion for Rehearing En Banc. 495 A.2d 1134 (D.C. 1985), *reh'g denied*, No. 82-148 (D.C. Oct. 21, 1985).

OPINIONS BELOW

On the day of trial, a District of Columbia Superior Court Judge granted summary judgment in favor of the defendant Maryland Steel Erectors, Inc. on the authority of this Court's holding in *Rodriguez* v. *Compass Shipping-Co.*, 451 U.S. 596 (1981), which overruled the caselaw in

effect in the District of Columbia at the time. *See Potomac Electric Power Co.* v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965). This action was filed prior to *Rodriguez*, but nonetheless was held timebarred by the holding in that case because under *Rodriguez* the cause of action was possessed by the workers' compensation insurance carrier at the time the action was brought. Appendix C. The District of Columbia Court of Appeals opinion and order from which certiorari is sought appears as Appendix B. The order of the District of Columbia Court of Appeals dismissing the Petition for Rehearing and/or Suggestion for Rehearing En Banc, dated October 21, 1985, appears as Petitioner's Appendix A.

JURISDICTION

The District of Columbia decided this case on July 5, 1985. A timely Petition for Rehearing and/or Suggestion for Rehearing En Banc was filed and the Court filed a Response to the Petition. The Court denied the Petition for Rehearing on October 21, 1985, with two judges voting to rehear the case. Appendix A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976).

RELEVANT STATUTES

The relevant statutory provisions are as follows:

The District of Columbia Code (1973):

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act As Made Applicable to the District of Columbia.

> **The provisions of the Longshoremen's and Harbor Workers' Compensation Act, including all amendments that may hereafter be made thereto,**

shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in implying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia and the term "employee" shall be held to mean every employee of such person.

Pub. L. No. 98-426, 98 Stat. 1639 (1984):

§ 21 (a) Section 33(b) is amended to read as follows:

(b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board.

Effective Date

§ 28(a) Except as otherwise provided in this section, the amendments made by this Act shall be effective on the date of enactment of this Act and shall apply both with respect to claims filed after such date and to claims pending on such date.

28 United States Code § 1257(3)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a . . . statute of the United States is drawn in question . . .
>
> For the purposes of this section, the term "highest court of a state" includes the District of Columbia Court of Appeals

1 U.S.C. § 109 (1982):

The repeal of any statute shall not have the effect to release any . . . liability incurred under such statute . . . and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability. D.C. Code § 1-206 (1981).

STATEMENT OF THE CASE

Petitioner, John D. O'Connell, commenced this civil action against the respondent Maryland Steel Erectors, Inc. for personal injuries on November 6, 1979 in the District of Columbia Superior Court, eight months after having received a formal award of compensation benefits. At the time suit was filed, petitioner's rights were governed by the principles enunciated in *Potomac Electric Power Co.* v. *Wynn,* 343 F.2d 295 (D.C. Cir. 1965), which held that an injured compensation claimant retained standing to sue a third party defendant even after the six-month assignment provision contained in 33 U.S.C. § 933(b) had run. On the

day of trial, December 16, 1981, the trial court granted summary judgment to the respondent on the authority of this Court's decision in *Rodriguez* v. *Compass Shipping Company,* 451 U.S. 596 (1981), which overruled *Wynn* and held the statutory assignment contained in § 933(b) to be an irrevocable assignment of the cause of action. While the case was on appeal, the Congress passed the Longshore and Harbor Workers' Compensation Act Amendments of 1984,[1] which amended § 933(b) to provide for a statutory reversion of the cause of action if the person to whom the statutory assignment was made did not commence suit within ninety days after having been assigned the cause of action[2] This new amendment was made applicable as of September 28, 1984, the date President Reagan signed the legislative amendments.[3]

On July 5, 1985, the District of Columbia Court of Appeals affirmed the entry of summary judgment by the trial court, holding in part that the 1984 Longshore Amendments are inapplicable to claims governed by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)[4] as made applicable to the District of Columbia by the District of Columbia Workers' Compensation Act of 1928 (the 1928 Act).[5] The Court reasoned that the claims governed by virtue of the 1928 Act were not affected by the 1984 Longshore Amendments because a new, local act, which governs employment-related injuries occurring on and after July 26, 1982 in the District of Columbia, repealed the 1928 Act, thus preventing those 1978

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[1]Pub. L. No. 98-426, 98 Stat. 1639 (1984)

[2]Pub. L. No. 98-426, 98 Stat. 1639, Sec. 21(a) (1984).

[3]Id., Sec. 28(a) (1984).

[4]33 U.S.C. §§ 901 *et. seq.* (1982).

[5]D.C. Code §§ 36-501 *et seq.* (1973).

Act claims which continue to be governed by the LHWCA from being affected by the 1984 Amendments.

The petitioner filed a timely Petition for Rehearing and/or Suggestion for Rehearing En Banc, to which the Court of Appeals ordered the respondent to reply. The petition was denied on October 21, 1985, with two associate judges voting to rehear the case.

ARGUMENT

I. THE D.C. COURT OF APPEALS ERRED IN CONCLUDING THAT THE 1984 LONGSHORE AMENDMENTS DO NOT APPLY TO CLAIMS GOVERNED BY THE ACT.

The *O'Connell* Court's conclusion that the 1984 Longshore Amendments do not apply to cases governed by the 1928 Act begins with the Court's conclusionary, and erroneous statement that the City Council's repeal of the 1928 Act, "diverced the local workers' compensation system entirely from the Longshore Act of 1927." *O'Connell,* 495 A.2d at 1141. To the contrary, all the parties agree that only those injuries occurring after the effective date of the new law are divorced from the operation of the provisions of the Longshore Act and its administration by the United States Department of Labor. The District claims still governed by the provisions of the Longshore Act have never been, and are not now, divorced from the Longshore Act's compensation system. In fact there are two different statutory compensation schemes existing concurrently in the District today, one local and one federal. The *O'Connell* Court's misunderstanding of the concurrent workings of these statutory schemes is apparent, and is fatal to the logic of its decision. See *Henry* v. *George Hyman Construction Co.,* 749 F.2d 65 (D.C.

Cir. 1984); *Crum* v. *General Adjustment Bureau,* 738 F.2d 65 (D.C. Cir. 1984); *Randall* v. *Comfort Controls, Inc.*, 725 F.2d 791, 792 n. 2 (D.C. Cir. 1984); *Carter* v. *Director, OWCP,* 751 F.2d 1398, 1399 n. 1 (D.C. Cir. 1985); *Stevenson* v. *Linens of the Week,* 688 F.2d 93, 95 n. 1 (D.C. Cir. 1982).

The *O'Connell* Court then concluded that the federal savings statute preserved the appellant's right of action against third parties under the 1928 Act, but that the savings statute did not allow removal of limitations imposed under the 1928 Act pursuant to "subsequent Congressional amendment to another act." 495 A.2d at 1141-42. In so holding the Court demonstrated a profound misunderstanding of the relationship between the 1928 Act, the jurisdictional provision, and the Longshore Act itself, which is the substantive statute. The Court also neatly avoided addressing the points raised by Mr. O'Connell in his appeal. It is not the provisions of the 1928 Act that preserve a claimant's right to bring an action against negligent third parties, but rather the substantive provisions of 33 U.S.C. § 933(a). The 1928 Act contains no substantive provisions, and is merely a provision circumscribing jurisdiction and making the Longshore Act, and its future amendments, applicable to employers carrying on any employment in the District of Columbia. The 1928 Act's repeal simply prevented the applicability of the Longshore Act and its future amendments *to new injuries* occurring after the effective date of the new statute. It did not make the Longshore Act and its future amendments any less applicable to the injuries it continues to govern. The wisdom of Congress in making future amendments applicable to 1928 Act claims is unquestionable, since the Longshore Act and its many extensions are centrally ad-

ministered.[6] The *O'Connell* rationale not only frustrates the clear intent of both Congress and City Council, but will also hamper the fair and expeditious administration of 1928 Act claims and adversely impact 1928 Act claimants, a result clearly contrary to the oft-cited beneficient purposes of the Longshore Act. *See, e.g., Swinton* v. *J. Frank Kelly, Inc.,* 554 F.2d 1075 (D.C. Cir. 1976).

A second point raised by this Petitioner, and left unaddressed by the *O'Connell* Court, is whether the general savings statute saves the 1928 Act's incorporation clause as well as its jurisdictional provisions. *De La Rama Steamship Co.* v. *United States,* 344 U.S. 386 (1953) indicates that where the entirety of the statute is necessary to effectuate its purposes, then the *entire* statute is saved. Why or how the jurisdictional provision of the 1928 Act is "saved," while the clause incorporating future substantive amendments to the Longshore Act is nowhere addressed by the *O'Connell* Court. If the purpose of the savings statute in this setting is to preserve claimants' rights to future compensation benefits under the substantive provisions of the Longshore Act, then there is no reason why those rights and liabilities, which continue to accrue on a weekly basis and which will extend many years into the future, should not be measured by the Congressional wisdom reflected in legislative changes. *O'Connell's* interpretation of the general savings statute does not make sense because it disconnects the local employer-employee relationship under the statutory plan from the Longshore

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[6]There is also absolutely no rational reason why Congress would want to make its amendments applicable in the longshore industry and in every other context where the Longshore Act applies, but not in the District of Columbia.

Act.[7] There is absolutely no evidence that Congress intended such a ludicrous result, and the savings statute itself by no means compels the conclusion the *O'Connell* Court reaches. In fact, the Court's ultimate conclusion helps neither the employer nor his injured employee, but only a tortfeasor foreign to the statutory relationship. Contrary to the Court's conclusion, the 1928 Act had not "ceased to exist" for the parties subject to its jurisdictional coverage. *Id.* at 1142. For them, the 1928 Act and the Longshore Act remain fully viable, and for them the 1984

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[7]Uniform application of the Longshore Act and its measure of compensability have been seriously undermined by *O'Connell.* Under the Longshore caselaw, a worker may obtain benefits for disability for an occupational disease if the covered employment exposed him to injurious substances. *Todd Shipyards* v. *Black,* 717 F.2d 1280 (9th Cir. 1983). This is so even where the injured worker has sustained subsequent injurious exposure in non-covered employment. *Id.' Todd* v. *Todd Shipyards Corp.,* 16 BRBS 163 (1984)' *Smith* v. *Aerojet General Shipyard,* 16 BRBS 49 (1983). This rule has been uniformly followed in this jurisdiction under the 1928 Act, and many claimants have relied on this rule of law. Following *O'Connell,* however, one Administrative Law Judge has ruled that these precedents no longer apply in the District, and therefore no claim for benefits lies under the 1928 Act so long as the injured worker had an opportunity to obtain benefits in another jurisdiction where subsequent injurious exposure occurred. *McAbier* v. *Ball-Healy-Granite,* 84-DCWC-147 (ALJ Dunau, Aug. 20, 1985). Furthermore, the holding of *O'Connell* means that 1984 Longshore Amendments extending the statute of limitations (from one to two years) and liberalizing notice requirements (from 30 days to one year) in occupational disease claims will not govern the claims of Metro tunnel miners, a harsh result that will defeat the claims of many legitimately injured workers. See *Pryor* v. *James McHugh Const. Co.,* Case 85-LHC-114, where a claimant suffering from silicosis was denied benefits because *O'Connell* operated to preserve the 30 day written notice requirement. The claimant's notice, filed 33 days after seeing a lung specialist, was held fatally deficient despite the fact that documented silica dust exposures in excess of 294 times permitted OSHA levels were in the possession of the employer. These post *O'Connell* decisions highlight graphically the disintegration of the 1928 Act once it is disassociated from the Longshore Act.

Longshore Amendments have become a part of the substantive law governing their cases.

The *O'Connell* Court also indicates that it sees no evidence that Congress intended the 1984 Longshore Amendments to apply in any context except the maritime one. *Id.* at 1143-45. In fact the Court cites with apparent approval Congress' removal of certain employments from the ambit of the Longshore Act as support for the perceived limited applicability of these amendments. These conclusions are demonstrably incorrect and constitute clear error. The 1984 Longshore Amendments apply to all extensions of the Longshore Act except where specifically indicated otherwise.[8] Thus, the amendments will have a significant impact on the employer-employee relationship wherever the Longshore Act is the applicable substantive law. Furthermore, the Congress' removal of certain occupations from the ambit of the Longshore Act, far from supporting the Court's conclusion, shows clearly that Congress knows how to inform the courts when the Longshore Act and its amendments are not applicable. As Congressman George Miller indicated to the House of Representatives in his September 18, 1984 speech in support of the 1984 Longshore Amendments:

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[8]Apart from its application in the District of Columbia, Congress has also extended the Longshore Act to civilian employees on defense bases, employees of non-appropriated fund instrumentalities such as military exchanges, employees of government contractors injured overseas by war risk hazards, and workers on oil drilling rigs on the outer Continental shelf. See Defense Base Act, Act of Aug. 16, 1941, ch. 357, § 7, 55 Stat. 622 (codified as amended at 42 U.S.C. §§ 1651-1654)' Nonappropriated Fund Instrumentalities Act, Act of June 19, 1952, ch. 444, § 2, 66 Stat. 139 (codified as amended at 5 U.S.C. §§ 8171-8173)' War Hazards Compensation Act, Act of December 2, 1942, ch. 668, Title I, § 1702)' and Outer Continental Shelf Lands Act, Act of Aug. 7, 1953, ch. 345, § 4(c), 67 Stat. 462 (codified as amended at 43 U.S.C. § 1333(c)).

"This is a consensus report. It received the unanimous support of every member of the conference committee, from both parties and every ideology. To make certain that there are no grounds for misinterpretation or abuse, either by those charged with enforcing the law, the courts, or others, we have spoken very clearly both in the statutory language and in the statement of managers.

We meant what we said, and we said what we meant. We do not want to see protracted court battles over the intent of Congress. If it isn't in the statute or clarified in the statement of managers, it should be accorded little if any legislative intent.

This is a complicated bill, but its underlying principle is really quite simple. Some employers and employees who were never supposed to be covered by the Longshore Act have been included in its coverage; some of the benefits have been excessive.

By the same token, individuals who should receive Longshore Act compensation, medical assistance, death and survivor benefits have found the law and the courts unresponsive to their legitimate claims for assistance, as documented in yesterday's Washington Post.[9]

Cong. Record, H 9730, Sept. 18, 1984.

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[9]Congress was urged to enact a provision in the continuing budget resolution exempting WMATA from any tort liability that would otherwise be resurrected by the Longshore Amendments. The Congress failed to pass any such exemption. See Congressman Miller's reply. (Appendix E).

Congressman Miller went on to explain the significance of the amendments overruling *Washington Metropolitan Area Transit Authority* v. *Johnson,* 104 S. Ct. 2827 (1984). A review of his statement, in the context of his reference to the Post article, leaves no doubt that where Congress intended the 1984 Longshore Amendments not to apply, it was specifically indicated. From this legislative history, which is not even mentioned by the *O'Connell* Court, it is clear that it is the intent of Congress that these amendments apply to 1928 Act claims, regardless of their unpopularity with the staff of the Washington Post.

An additional statutory provision further undermines the rationale of *O'Connell* and is extremely important to the resolution of this issue.

Section 1-206 of the District of Columbia Self-Government Act, D.C. Code §§ 1-201 *et seq.* (1981), provides:

> § 1-206. Congressional reservation of authority.
>
> Notwithstanding any other provision of this Act, *the Congress of the United States reserves the right, at any time,* to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation *to amend* or repeal *any law in force in the District prior to or after enactment of this Act* and any act passed by the Council. (emphasis added)

Under this provision, Congress reserves the right to amend, *at any time,* any Congressional enactment in force in the District. The parties in this case *agree* that the 1928 Act and, by extension, the Longshore Act are still in force

in the District of Columbia for the class of cases they govern. Since Congress reserved the right to amend *any* statute in effect in the District, it would strangle the meaning of this section (as well as that of the general savings statute) were the Court to hold that the 1984 Longshore Amendments were incapable of affecting the application of the Longshore Act in the District of Columbia.

As we have discussed, the substantive provisions of the Longshore Act will continue to govern a class of District of Columbia compensation cases for many years to come, and the Act remains under the jurisdiction of the United States Department of Labor. It would be preposterous to nevertheless conclude that, while Congress may amend the New D.C. Act (with which the federal government has no involvement), it may not amend the statute that City Council has left under its full control. In effect, this provision is another savings statute applicable to this case: one that manifests Congress' desire to retain the ability to amend any Acts of Congress applicable in the District.

The *O'Connell* Court held that the repeal by City Council of the 1928 Act *prevented* the 1984 Longshore Amendments from applying to District of Columbia cases governed by the Longshore Act. *O'Connell v. Maryland Steel Erectors, Inc., supra* at 1142 (D.C. 1985). Were this interpretation of Council's intent correct, it would bring the repeal provision of the New D.C. Act into *direct* conflict with Section 1-206. While the City Council had the right to legislate in the workers' compensation field, it does *not* have the right to *prevent* Congress from legislating in that field, and any attempt to do so would be violative of the Home Rule Act. The only interpretation of the repeal provision of the New D.C. Act that does not render it null and void is an interpretation that, in harmony with the pur-

poses of Section 1-206 and the general savings statute, recognizes Congress' right to amend any law in effect in the District.

In summary, although it appears that no Court has yet interpreted Section 1-206, it quite clearly constitutes a reservation by Congress of the right to amend any statute in force in the District. The statute should be interpreted by this Court in a manner that serves rather than frustrates the intent of the District of Columbia City Council and Congress. The Council has clearly shown that it wishes to leave the administration of pre-New Act claims under the control and guidance of the U.S. Department of Labor, Congress and the United States Courts of Appeal. Congress, in its wisdom, has concluded that amendments to the Longshore Act were needed. Since Congress clearly intended that the amendments apply in the District, Section 1-206 should serve to effectuate that intent.

II. THE AMENDMENT TO SECTION 933(b) HAS EFFECTED A STATUTORY REVERSION OF THE CIVIL CAUSE OF ACTION TO THE PETITIONER WHILE THE CASE WAS PENDING ON APPEAL, GRANTING HIM STANDING TO PROCEED WITH HIS CAUSE OF ACTION

Under the framework of the 1984 Amendments, there is a hiatus of 90 days after the original six-month assignment period, during which time the employer or carrier is vested with the right to institute a cause of action against any third-party responsible for the injuries sustained by the worker. After the expiration of the 90-day period, the right to maintain a cause of action reverts to the employee. Thus 90 days after the effective date of the amendments, September 28, 1984, on December 27, 1984, the petitioner

again was reassigned his statutory claim. It is undisputed that the compensation carrier did not file any action in this case.

The doctrine of "relation back" is generally invoked to associate amendments with the date of the original pleadings, so that they would not be barred by the statute of limitations whenever the claim or defense asserted in the amendment arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. *See Deupree* v.*Levinson,* 186 F.2d 297 (6th Cr. 1950); *Hodges* v. *Kimball,* 91 F. 845 (4th 1899); *United States* v. *Memphis Cotton Oil Co.,* 288 U.S. 62 (1933); *Missouri, Kansas & Texas Ry. Co.* v. *Wolf,* 266 U.S. 570 (1925).

These decisions are based upon the general proposition that in such cases the defect is purely formal or procedural, and that essential justice requires that the amendment be permitted. It is pointed out repeatedly, as in the facts in this case, that there is no actual change in the cause of action and that the defendants are in no way prejudiced by allowing the amendment.

As stated by Justice Holmes in *N.Y. Central & Hudson River Rd. Co.* v. *Kinney,* 260 U.S. 340, 346 (1922):

> "When a defendant had had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied."

The doctrine of "relation back" is fully consistent with and furthers the fundamental policy of seeing that cases are tried on the merits and not dispensed with due to pro-

cedural technicalities. *Staren v. American Nat'l. Bank & Trust Co. of Chicago,* 529 F.2d 1257, 1263 (7th Cir. 1976); *Defranco* v. *United States,* 18 F.R.D. 156, 159 (S.D. Cal. 1955). *See also, Williams* v. *United States,* 405 F.2d 234, 236 (5th Cir. 1968). The important part of the law is that which gives a right of action, and not that part which provides who may enforce it; the latter is an incidental provision. *Lang* v. *Houston, W. St. & P.F.R. Co.,* 75 Hun. 151, 27 N.Y.S. 90 (1899).

The doctrine of "relation back" is in essence a principle founded in equity and invoked when needed to avoid unjust results. Although "relation back" is generally invoked to relate an amendment back to the original complaint, courts have invoked the doctrine, in situations closely analogous to the present case. The following two cases illustrate fact situations similar to this case where the courts have invoked the doctrine to allow an action to be tried on its merits even though it was commenced at a time when the plaintiff did not have the technical right to do so but subsequently acquired the right after the statute of limitations had run.

In *Co-Opportunities* v. *Nat'l. Broadcasting Co.,* 510 F. Supp. 43 (N.D. Cal. 1981), Broadcast Marketing Co. (BMC) was the owner of a copyright. In June of 1977, BMC transferred the copyright to plaintiff Co-Opportunities. Plaintiff, however, did not acquire the right to sue for infringements on the copyright that occurred prior to the date of transfer. Plaintiff acquired such right on December 16, 1980 yet commenced action for infringement againt defendant National Broadcasting Co. in June of 1979 for act of infringement that occurred in August of 1976. Had plaintiff filed suit subsequent to December 16, 1980, the date he acquired the right, his right of action

would have been barred by the applicable statute of limitations.

On these facts, defendant argued that plaintiff lacked standing to sue in June of 1977 and since the statute had run before plaintiff acquired standing on December 16, 1980, the suit could not be brought. The court, however, invoked the doctrine of relation back and held that because plaintiff acquired standing on December 16, 1980, justice demanded that the date on which he acquired standing to bring the action related back to the date he filed the initial complaint. Even though plaintiff did not amend the pleadings, the court nonetheless found that the complaint filed in July of 1979 was effective to commence the action.

The court focused on whether the defendant was given sufficient notice, and whether the claim as originally filed was essentially the same as would be heard at trial. Answering these questions in the affirmative, the court determined that the plaintiff's right to be heard on the merits should not be defeated by an overly technical application of the applicable statute of limitations.

In *Castle* v. *Lockwood-MacDonald Hospital,* 40 Mich. App. 597, 199 N.W.2d 252 (1972), plaintiff's deceased husband either fell or jumped to his death from a window in a room belonging to defendant Lockwood-MacDonald Hospital. Plaintiff was appointed special administratrix of her husband's estate on May 14, 1970 and on May 15, 1970, commenced a wrongful death action against defendant hospital alleging that it was negligent in maintaining an open, low silled window in deceased's room. Under Michigan law, plaintiff as special administratrix did not have standing to sue for the wrongful death of her husband at the time she commenced the action. She did,

however, acquire the right by a court order on June 15, 1970. The court granted defendant's motion to dismiss the action holding that at the time plaintiff commenced the action, she was without standing and that although she did subsequently acquire the right on June 15, 1970, the statute of limitations had run as of May 17, 1970 thus barring her claim.

The Michigan Court of Appeals reversed, holding that the court order of June 15, 1970 giving the plaintiff the power to commence actions on behalf of the estate will relate back to the date the action was filed even though the statute of limitations ran between the date of filing the action and the date the empowering order was entered. Plaintiff as in *Co-Opportunities* did not amend the complaint. The court placed great emphasis on the fact that plaintiff in good faith and with reason believed herself equipped with the necessary legal authorization to institute the suit. The court also noted that the reason for the application of the doctrine of relation back as a means of defeating the defense of the statute of limitations is the desire of the courts not to have valid claims avoided by legal technicalities provided the plaintiff acted in good faith, and had some reasonable grounds for believing the existence of a right to commence suit.

The Petitioner submits that the relevant facts in the instant case are on all fours with the facts in *Co-Opportunities* and *Castle,* and that the doctrine of "relation back" should likewise be invoked to permit the Petitioner to proceed with the action he filed.

Here, as in *Co-Opportunities* and *Castle,* plaintiff commenced an action within the statute of limitations in good faith and in accordance with the prevailing law in this jurisdiction. Subsequently, the law was interpreted in such a way as to bar his claim.

In the instant action, Maryland Steel also received timely notice within the statute of limitations that O'Connell was instituting a tort action against it. Thus Maryland Steel will not be prejudiced if it is required to maintain its defense on the merits. But for the Supreme Court's holding in *Rodriguez,* rendered almost two years subsequent to the filing of the complaint, the respondent would have no ground to challenge petitioner's standing to bring suit *on the date of filing.* Pursuant to the new amendments, which were made applicable to pending cases, the petitioner has been reinvested with his cause of action. There is simply no just reason for not permitting the reassignment to cure the lack of standing that existed at the time of actual filing. As a matter of common sense, it should be noted that the *O'Connell* decision benefits neither the employer nor the injured employee, but only the tortfeasor who obtains a windfall for his tortious misconduct. It is an unconscionable result, and should be reviewed by this Court.

CONCLUSION

For each and all the reasons set forth above, Petitioner respectfully urges this Honorable Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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January 17, 1986

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001

No. 82-1486

JOHN D. O'CONNELL,
Appellant,

v. CA14192-79

MARYLAND STEEL ERECTORS, INC., ET AL.,
Appellees.

BEFORE: Pryor, Chief Judge; *Nebeker, Mack, Newman, *Ferren, Belson, Terry, and Rogers, Associate Judges; *Reilly, Chief Judge, Retired.

ORDER

On consideration of appellant's petition for rehearing and/or rehearing en banc, and the responses thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Associate Judges Newman and Rogers would grant rehearing en banc.

Copies to:

Honorable Sylvia Bacon

Clerk, Superior Court

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District of Columbia
Court of Appeals
Filed Oct 21 1985

APPENDIX B

DISTRICT OF COLUMBIA COURT OF APPEALS
No. 82-1486
John D. O'Connell, Appellant,

v.

Maryland Steel Erectors, Inc., et al, Appellees

Appeal from the Superior Court
of the District of Columbia

(Hon. Sylvia Bacon, Trial Judge)

(Reargued April 1, 1985 Decided July 5, 1985)

Peter J. Vangsnes for appellant. *William C. Burgy* and *Karl N. Marshall* were on the briefs, for appellant.

Walter J. Murphy, Jr., with whom *Hugh W. Farrell* entered an appearance, for appellee Maryland Steel Erectors, Inc.

Gary W. Brown, entered an appearance for appellee Steele & Moroney, Inc.

Walter A. Smith, Jr., with whom *Vincent H. Cohen* and *Robert B. Cave* were on the briefs for *amicus,* Washington Metropolitan Area Transit Authority.

Before Nebeker and Ferren, *Associate Judges,* and Reilly, *Chief Judge, Retired.*

Reilly, *Chief Judge, Retired:* This is an appeal from the dismissal of an action for negligence brought by a construction worker against the corporate owner of a rotating crane on a building project where he had suffered chest and shoulder injuries. Eight months prior to commencing such action, he had been formally awarded workmen's

compensation pursuant to a disability claim filed against his own employer, the contractor who had hired him to work on the site. At the time of the injury, the District of Columbia workers' compensation statute incorporated by reference the provisions of the Longshoremen's and Harbor Workers' Compensation Act of 1927, as amended, 33 U.S.C. § 901 *et seq.*, one of which, Section 33(b)[1] allowed a disability claimant, even after accepting workmen's compensation, to sue a person other than his employer within six months after the award. If he failed to do so, his right of action under this subsection was assigned to his employer.

In the instant case, as appellant had let the six-month deadline elapse before beginning his action, the trial court granted a motion to dismiss, observing that in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981), it was established that the running of the six-month period barred any suits not initiated by the employer or his subrogee.[2]

[1]33 U.S.C. § 933(b) (1982). This particular subsection was one of the amendments passed by Congress in 1959 to the Longshore Act. Prior to its enactment, a disabled worker was confronted with a choice of remedies. He could file a claim against his own employer for statutory compensation, irrespective of negligence, or sue a third party whose conduct caused the injury — but he could not do both. If the worker elected and received compensation, the employer or his insurance carrier under subrogation principles then could sue a third person deemed responsible for the accident for reimbursement.

[2]In *Rodriguez*, the Supreme Court had granted certiorari to resolve a conflict between the Courts of Appeal of the Second and Fourth Circuits on the interpretation of Section 33(b) of the Act. Just eight days after the Second Circuit had decided that when injured longshoremen failed to bring suit within six months, the employer to whom their claims had been assigned thereafter had the exclusive right to pursue third-party claims, the Fourth Circuit issued an opinion to the contrary in *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980). Its holding was that if the assignee chose not to sue, the disabled workers by appropriate pleadings could gain reassignment of their cause of action.

Citing *Rodriguez,* we reached the same conclusion in two similar cases, *Dodson v. Washington Automotive Co.,* 461 A.2d 1020 (D.C. 1983) and *Milligan v. Brian Construction Development Co.,* 485 A.2d 593 (D.C. 1984). We are now urged to vacate the order of the trial court and remand the case for trial on the grounds that (1) *Rodriguez* is not controlling with respect to litigation commenced before the release of that opinion, and (2) in any event a Congressional amendment to the Longshore statute (which became law during the pendency of this appeal) has breathed new life into the dismissed action. Deeming neither of the grounds urged for reversal as persuasive, we affirm.

I

In developing his first ground, appellant asserts that the motions court in this case should have deferred to *Potomac Electric Power Co. v. Wynn,* 120 U.S. App. D.C. 13, 343 F.2d 295 (1964). He points out that this decision of the United States Court of Appeals for this circuit was not specifically disapproved by the Supreme Court until it handed down its *Rodriguez* opinion in 1981, more than a year after appellant had begun his action in the Superior Court. In the *Wynn* case, the plaintiff waited for sixteen months after being awarded compensation benefits before filing an amended complaint against PEPCO. The appellate court affirmed the denial of a motion to dismiss. It recognized that after the six-month period had run, the right to recover the compensation award was assigned to the employer who had paid it, but nevertheless that if such assignee then failed to exercise such right – for any reason – the injured employee was not precluded from suing.

In arriving at this conclusion – seemingly at odds with the actual wording of the statutory language interpreted –

the court cited *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956), a case which antedated the 1959 amendments to Section 33.[3] In *Czaplicki,* the petitioner's rights of action against third parties were assigned by the act to his employer after he accepted compensation under an award. The employer's insurer, Travelers Insurance Company, was in turn subrogated to those rights. Travelers, however, was also the insurer of one of the third parties subject to suit. Thus, facing additional liability if such right of action was successfully asserted, it had no reason to bring suit. The Supreme Court held that where the assignee's interests are in conflict with those of the employee, the latter had a cause of action against a negligent third party, despite the prior assignment.

But by holding that an employee can bring suit against a third party whenever the employer-assignee fails to do so, the *Wynn* decision went considerably beyond *Czaplicki.* Professor Larson described *Wynn* as the "most extreme extension" of *Czaplicki.*[4] It also seems that the *Wynn* opinion missed the point of the 1959 amendment to Section 33, which was to protect employees in *Czaplicki* situations by affording them a right to sue independently for a six-month period.

Appellant's position, however, is that irrespective of whether or not *Wynn* was properly decided, it was still the

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[3]Section 33(b), 33 U.S.C. § 933(b) (1982), reads as follows:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

[4]2A A. LAWSON'S, WORKMEN'S COMPENSATION LAW § 75.47 at 14.555 (1982).

law of this jurisdiction when he commenced his action, for under the policy of this court enunciated in *M.A.P. v. Ryan,* 285 A.2d 310, 312 (D.C. 1971), decisions of the United States Court of Appeals for this circuit rendered prior to February 1, 1971, "like the decisions of this court, constitute the case law of the District of Columbia."[5] From this premise, he argues that the dismissal of his action on the authority of *Rodriguez* gave retroactive impact to that decision in circumstances which the Supreme Court itself had deemed unjust. He distinguishes our holding in *Dodson* and *Milligan, supra,* which also treated *Rodriguez* as controlling, on the ground that the issue of retroactivity was not specifically addressed in those opinions – as it had not been raised by the unsuccessful plaintiffs.

The problem of drawing a line between the kind of appellate decisions which should be deemed purely prospective, rather than retroactive in their effect, has been considered in several cases by the Supreme Court in recent years. The one upon which appellant primarily relies is *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971). There the court remarked that a threshold requirement for depriving a decision of retroactive effect is that such decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 106 (citations omitted). That factor alone is not conclusive for the court also stressed that inquiry should be made into the history and the purpose of the new rule of decision and "whether

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[5]The *Ryan* opinion, reserved the right of this court sitting en banc, to refuse to follow such decisions. *Ryan, supra,* 285 A.2d at 312. Another well recognized exception to this principle of deference applies to pre-1971 decisions discredited by later holding of the Supreme Court, *e.g., Capital Holding Corp. v. District of Columbia,* 374 A.2d 573 (D.C. 1977).

retrospective operation will further or retard its operation,' " *id.* at 106-07 (quoting *Linkletter v. Walker,* 381 U.S. 618, 629 (1965)), and whether inequity would result from retroactivity.

The plaintiff in *Chevron* was injured while working on an offshore drilling rig close to the Louisiana coast, but did not file suit against Chevron until two years after the accident.[6] During pretrial discovery, the Supreme Court published *Rodriguez v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969), in which overruling a long line of federal decisions, it held that under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (1982), state law, rather than admiralty law, is applicable to actions based on personal injuries occurring on offshore structures. On the authority of that holding, the federal district court where the action was pending then held that Louisiana's one-year statute of limitations barred respondent's suit, but was reversed by the Court of Appeals for the Fifth Circuit.

In agreeing that *Rodriguez* should not have been applied retroactively, the Supreme Court emphasized that in addition to being a case of first impression in that court, *Rodriguez* overruled decisions clearly establishing "that admiralty law, including the doctrine of laches, applies through the Lands Act." *Chevron, supra,* 404 U.S. at 107 (citations omitted). Hence, it could not "be assumed that . . . [plaintiff] did or could foresee that this consistent interpretation of the Lands Act would be overturned." His reliance on the old law, therefore, was well-founded and consequently the dismissal of his action for untimeliness

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[6]The *Chevron* case did not involve the Longshore Act, for the injured worker apparently elected to sue his employer directly instead of claiming workmen's compensation.

"on the basis of superseding legal doctrine . . . quite unforeseeable" was reversible error. *Id.* at 108.

In a subsequent opinion, *United States v. Johnson,* 457 U.S. 537 (1982), the Supreme Court undertook an extended review and analysis of the factors justifying the nonretroactive application of judicial opinions. It concluded that when the court has declared a rule of criminal procedure to be "a clear break with the past," it has almost invariably found "such a 'newly minted principle' nonretroactive." *Id.* at 549 (citation omitted). In a footnote which cited *Chevron, supra,* as an example, the court observed that in the context of a civil case, the "clear break principle" has unusually been stated as the threshold test. *Johnson, supra,* 457 U.S. at 550 n.12. We drew heavily upon these observations in *Brodis v. United States,* 468 A.2d 1335, 1337 (D.C. 1983), in refusing to set aside a conviction in a case tried prior to a novel holding of this court overruling a longstanding procedural practice.

Accordingly, the issue before us turns on the question of whether the construction of Section 33(b) by the Supreme Court in the *Rodriguez* case represented a "clear break with the past." In our opinion, it did not, for the rule of decision in *Wynn* at the time appellant's action was filed here had been undermined by intervening legislation in Congress. In the *Wynn* opinion, the court pointed out not merely the potential of conflicting interests in cases like *Czaplicki,* where there was a common insurer, but to another decision discouraging employers from suing third-party tortfeasors, *viz., Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124 (1956). There it was held that a shipowner liable for injuries to a longshoreman could recover over against the employer-stevedore for breach of the latter's implied duties of safety. Plainly this prospect of double liability would deter any

assignee from suing to recover the compensation paid to the disabled employee.

Congress remedied this defect in the Act in 1972 by adopting an amendment to Section 5(b), 33 U.S.C. § 905(b), which eliminated a third party's right of indemnification from the primary employer thereby repudiating the *Ryan* doctrine. The United States Court of Appeals for the Second Circuit noted these later changes in the Act in specifically declining to follow the *Wynn* holding. *Rodriguez v. Compass Shipping Co., supra,* 617 F.2d at 955, 961. Moreover, even before the 1972 amendment, the only other circuit court called upon to interpret Section 33(b) expressed the view that an evidentiary showing of a conflict of interest between employee and employer-assignee was necessary to enable workers to maintain actions filed after the six-month deadline. *McClendon v. Charente Steamship Co.,* 348 F.2d 298 (5th Cir. 1965).

Since the 1972 amendments, the bar of this jurisdiction has manifested no reliance upon the *Wynn* holding.[7] In supporting plaintiffs who began actions against third persons more than six months after accepting compensation, their counsel have successfully argued that the six-month period does not start to run until a formal award is made – a point quite unnecessary to make if *Wynn* was still controlling law. *See Carey v. Crane Service Co.,* 457 A.2d 1102 (D.C. 1983); *Collier v. John Mendis, Inc.,* 526 F. Supp. 459 (D.D.C. 1981); *Fearson v. Johns-Manville Sales Corp.,* 525 F. Supp. 671 (D.D.C. 1981). It is also significant that in the case before us, it is not contended that the individual claimant (appellant here) placed any reliance

[7]In *Mendes v. Johnson,* 389 A.2d 781 (D.C. 1978) (en banc), we stated that a relevant factor with respect to the application of a new rule of decision was the extent of the reliance of the parties on the old rule.

upon the *Wynn* decision – or indeed was even aware of it – when he permitted more than six months to go by before bringing suit against appellee.

It is our opinion that *Rodriguez* was typical of numerous holdings of the Supreme Court, resolving conflicts of decision among different circuit courts of appeals on the interpretation of a specified statute. The impact of such resolutions by the highest court does not affect the rights of parties who have entered into settlements or accepted as final unappealed judgments of lower courts based on the authority of the rule of decision ultimately disapproved, but they become controlling authority for the disposition of pending cases.[8] As the Supreme Court observed in a context obviously applicable to appellant's thesis that the court below should have treated *Wynn* as controlling precedent, "[d]eviant rulings by circuit courts of appeals . . . cannot generally provide the "justified reliance' necessary to warrant withholding retroactive application of a decision construing a statute as Congress intended it." *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970).

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[8]The same court which has handed down the *Wynn* opinion, concluded after *Rodriguez* that the 1959 and 1972 amendments had undercut even the basis for the *Czaplicki exception to Section 33(b). Accordingly, it dismissed a pending action, saying that the statute "no longer permits an employee to institute a third party action after the six month statutory window" citing with approval our memorandum opinion in Westbrook v. Hutchinson Crane Excavating Co.*, No. 82-1151 (D.C. June 30, 1983). *See Johnson v. Bechtel Associates*, 230 U.S. App. D.C. 297, 309, 717 F.2d 574 (1983) *reversed on other grounds, sub nom., Johnson v. WMATA, infra.*, n.9.

II

After this appeal was first argued, appellant moved for reargument, calling our attention to a new statute enacted by Congress while this case was *sub judice, viz.*, the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, approved September 28, 1984 (referred to herein as "1984 Act"). He contended that one of the amendments in that statute overruled the Supreme Court's decision in *Rodriguez v. Compass Shipping Co., supra,* and thus deprived our own decisions in *Dodson* and in *Milligan, supra,* of precedential significance. This particular amendment, revising Section 33(b) of the Longshore Act, provides that if the employer to whom the worker's right to sue a third-party tortfeasor has been assigned (after the running of the six-month period) fails to exercise such right within ninety days after assignment, such right reverts to the worker. Such amendment – as appellant correctly pointed out – was one of those provisions in the new act which [Section 28(a)] "apply both with respect to claims filed after such [enactment] date and to claims pending on such date." Accordingly, appellant argues that although he might have lost his right to sue a third party under the old act, such right has now reverted to him, because his employer (or subrogee) allowed ninety days to elapse without commencing any action.

In order to examine the possible impact of the 1984 Act upon this case and other pending litigation in the District, we granted appellant's motion for reargument in an order also allowing a motion by the Washington Metropolitan Transit Authority (WMATA) to file an amicus brief and to participate in the argument.

If appellant's construction of the new statute is correct, it would mean that a large number of employers whose as-

signed rights against third parties had already vested 90 days or more before the effective date of the new act, but who had not yet exercised them, would be deprived retroactively of ever being able to do so. If this was indeed the purpose of the statute, there would be serious questions about its constitutional validity.

Appellees, noting that the 1984 amendments to Section 33 also do away with priority of the employer's lien on the proceeds of a judgment against third parties, argue that the recent enactment conflicts with the Constitution, unless the words "claims pending" can be construed as limited to unadjudicated agency claims in contradistinction to actions at law pending in the courts.[9] But appellant contends that the provision he relies upon is more analogous to amendments affecting statutes of limitations, in which the doctrine of "relation back" has been successfully invoked, citing several authorities including *New York Central & Hudson R.R. v. Kenney,* 260 U.S. 340, 346 (1922).

We need not deal with such constitutional issues, however, for the crucial question here is whether the 1984

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[9]The actual wording of the statute seems to sustain such a limited construction, for other sections which regulate the prosecution of "claims" plainly refer to agency proceedings. But the correctness of such statutory interpretation is clouded by language in the report of the joint conference managers with respect to other amendments, set forth in Section 4 of the 1984 Act which revised two provisions of the Longshore statute for the purpose of depriving *WMATA v. Johnson,* 104 S.Ct. 2827 (1984) of "precedential effect." Jt. Rep. of Conference managers, Daily Cong. Record H.R. 9593; Sept. 14, 1984. In explaining these amendments, the conference report also stated – presumably with regard to the intent of Section 28(a):

> The Conference substitute also provides a special effective date so that these amendments apply to pending suits. This will avoid the dismissal under WMATA of third party suits which were pending or on appeal on the date of the enactment.

amendments to the Longshore Act have any relevance to this case. Appellant's injury did not occur in maritime employment. His right to compensation and to subsequent actions for damages consequently derives entirely from the District of Columbia Workers' Compensation Act of 1928, D.C. Code §§ 36-501,-502 (1973 ed.)[10] This Congressional statute in turn did make the provisions of what was then called the Longshoremen's and Harbor Workers' Compensation Act of 1927, including future amendments thereto, applicable to the injury or death of employees of persons carrying on private employment in the District.[11] But the 1928 act – one of purely local application – was expressly repealed by an act passed by the District Council in 1980, effective July 24, 1982.[12] Hence, appellees contend that amendments by Congress to the Longshore Act passed after the effective date of the repealer, have no bearing whatsoever on the rights of litigants, like appellant, who were awarded workers' compen-

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[10]Act of May 17, 1928; 45 Stat. 600, ch. 612 § 1, D.C. Code § 36-501 (1973 ed).

[11]Despite this incorporation by reference, it was recognized that the two statutes were separate and distinct, the authority of Congress to enact each piece of legislation resting upon powers granted by different clauses in the Constitution. *Gudmundson v. Cardillo*, 75 U.S. App. D.C. 230, 126 F.2d 52 (1942). The court noted that Congressional power to legislate with respect to longshoremen and other harbor workers rested on concept of admiralty jurisdiction over navigable waters (the 1927 act); and upon the clause granting Congress legislative authority over the territorial "seat of government" to deal with injuries in every type of work in the District of Columbia (the 1928 act).

[12]27 D.C. Reg 2503, 2541. Section 46 provides:

> An act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes, approved May 18, 1928 (45 Stat. 600; D.C. Code sec. 36-501-503) is hereby repealed.

sation because of injuries incurred in land based occupations in the District of Columbia. We agree.

Such repealer was merely one provision included in a comprehensive statute which replaced the District of Columbia Workers' Compensation Law of 1928 with a new method for compensating workers disabled in private employment in the District. D.C. Code §§ 36-301 to -344 (1981); D.C. Law 3-77, July 1, 1980, 27 DCR 2503. In adopting the new act the Council divorced the local workers' compensation system entirely from the Longshore Act of 1927. It provided that claims should be filed with and adjudicated by the municipal government instead of by a Federal agency and set a scale of compensation for different kinds of disabilities substantially below the corresponding levels in the Longshore Act – conforming more closely to the schedules established by state compensation laws in such neighboring jurisdictions as Maryland and Virginia.[13]

Shortly after its passage, the enforcement of the new statute was enjoined by an order of the Superior Court in a suit brought by labor organizations. It was not until 1982 that such order was reversed by a decisioin of this court holding that the Council had not exceeded its legislative authority under the District of Columbia Self-Government Act of 1973, D.C. Code §§ 1-102 to -295 (1981).[14]

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[13]At legislative hearings, the local business community made a showing that convinced the Council that construction companies, mercantile enterprises, and service industries doing business in the District were unfairly burdened by ever increasing insurance premiums charged by carriers to cover employers subject to disproportionately greater liability under the Longshore Act than under comparable state laws.

[14]*District of Columbia v. Greater Washington Central Labor Council AFL-CIO,* 442 A.2d 110 (D.C.), *rehearing denied,* 445 A.2d 960 (D.C. 1982), *cert. denied,* 460 U.S. 1016 (1983).

Because of the injunction, claims filed during the pendency of this litigation continued to be processed by the United States Department of Labor and governed by the old act. When the validity of the new statute was upheld, the Council by legislative resolution postponed its effective date to July 24, 1982. We subsequently held that a worker injured before this date had no rights under the new act, as such an injury was then still covered by the 1928 Act, and compensability depended on its provisions. *Garrett v. Washington Air Compressor Co.*, 466 A.2d 462 (D.C. 1983).

Appellant, pointing out that his injury also occurred before the effective date of the new act and was therefore covered by the 1928 act, incorporating the Longshore Act "including all amendments that may hereafter be made thereto,"[15] argues that he is therefore entitled to invoke the Longshore Amendments of 1984 with respect to the time limitations in law suits authorized by Section 33(b), notwithstanding the repeal of the 1928 act. In our opinion this argument flies in the face of a savings statute enacted by Congress to deal with the legal effect to be accorded a repealed statute. It provides in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute . . . and such statute shall be treated as still remaining in force *for the purpose of sustaining any proper action* or prosecution for the enforcement of such penalty, forfeiture or liability.

1 U.S.C. 109 (1982) (emphasis added).[16]

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[15]Act of May 17, 1928 n.10, *supra.*

[16]1 U.S.C. 109 is a general act of Congress applicable to the District of Columbia. D.C. Code § 49-301.

Accordingly, so far as appellant was concerned, despite the repeal of the 1928 act, his rights of action against third party tortfeasors were still preserved by the provisions of that statute. But this certainly does not mean that the limitations such statute had imposed on such rights were removed by subsequent Congressional amendments to another act.

As a result of the Council action repealing the District of Columbia 1928 Act, that act had ceased to exist by 1984, when Congress amended the Longshore Act. Had it not been for the repealer, the 1928 act would indeed have incorporated those amendments, including the revisions of Section 33 which would have benefited appellant's cause. But as the 1928 act was no longer on the books, what Congress subsequently did to the Longshore statute did not affect any rights created by such prior law.

Our conclusion on this issue is identical to that reached by three different federal trial judges in this jurisdiction, presiding over cases in which persons suing under the District of Columbia Act of 1928 contended that their rights had been enlarged because of the 1984 Congressional amendments to the Longshore Act. In each instance, these judges held that such amendments had no impact upon the workers' compensation laws governing the District.

The leading case, entitled *In re Metro Subway Accident Referral,* Misc. No. 82-306, slip op. (D.D.C. Dec. 18, 1984),[17] was an opinion and order of Judge Pratt dismissing approximately 90 lawsuits filed against the Transit Authority, decisions which had been stayed because of the pendency of appeals ultimately resolved by *WMATA v. Johnson, supra note* 9, 104 S. Ct. at 2836.

[17]Cited with approval and followed in *Stokes v. Hyman Construction Co.,* C.A. No. 84-1418, slip op. (D.D.C. Jan. 18, 1985) (Parker, J.); and in *Lewhew v. AFGO Engineering Corp.,* C.A. No. 81-1593, slip op. (D.D.C. Feb. 27, 1985) (Gasch, J.)

Plaintiffs in these suits – for the most part tunnel workers employed by construction subcontractors – having incurred occupational disability filed claims for compensation against their immediate employers under the District of Columbia 1928 Act. The resulting compensation awards were paid by an insurance carrier from whom WMATA itself – the general contractor – had purchased a "wrap-up" policy covering all the numerous subcontractors on the subway project against potential liability for injuries to the workers they hired. This precautionary step relieved such subcontractor of the necessity of taking out insurance on their own account.

Claimants filed tort actions against WMATA alleging that the Authority was negligent in permitting them to work under conditions likely to cause respiratory injuries.

Under Section 4(a) of the Longshore Act (then incorporated in the 1928 District of Columbia Act), which requires every employer to secure payment to his employees for payment compensable under the act, a contractor is under an obligation to secure payments to employees of his subcontractors unless the subcontractor has secured such payments. Section 5(a) of the act grants immunity to employers who have complied with the preceding section against additional liability.

The theory of the plaintiffs was that since their own employers – the subcontractors – had not been in default of their obligation to secure payments (*i.e.*, to carry liability insurance), WMATA was suable as a third party tortfeasor and could not claim immunity as an "employer." In the *Johnson* case, *supra,* the Supreme Court rejected this view in an opinion handed down June 26, 1984 – just before its summer recess. Soon thereafter, the United States District Court issued a rule to show cause as to why these actions and other pending actions against WMATA by plaintiffs in similar situations should not be dismissed.

In the interim, because of differences between the bills passed by the Senate and House on the Longshore Act Amendments, the measure had been referred to a joint conference committee. Although there was nothing in the versions of the legislation approved by either body dealing with the issue considered in the *Johnson* case, the conferees inserted a new provision in the conference substitute which amended Section 5(a) of the Longshore Act, so as to make it clear that a general contractor who took out worker's compensation insurance for his subcontractor's employees did not gain immunity as an "employer," unless such action was triggered by an actual failure of a subcontractor to comply with his statutory duty to "secure" compensation. This meant that general contractors who had followed the course of action taken by *WMATA* were no longer immune from liability in suits brought by employees of subcontractors, for the conference report, in explaining such amendment, expressly disapproved of the Supreme Court holding in the *Johnson* case, *supra,* and noted that in law suits still pending or on appeal, such holding should not be accorded "precedential effect" – an apparent reference to Section 28(a) of the 1984 Act mentioned earlier in this opinion.[18]

The conference substitute was passed by both branches of Congress without floor debate – the motion to adopt in the Senate following brief explanations by three of the Senate conferees, none of whom alluded to the Section 5(a) amendment or indeed to any possible bearing of the bill upon District of Columbia law.[19] The President approved the enrolled bill on September 27, 1984, releasing a short explanatory statement.

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[18]Joint Explanatory Statement of the Committee of Conference, Cong. Reg. H. 9598, September 1984.

[19]*See* Cong. Rec. S. 11621 to 11627, September 20, 1984.

Thus, later in the same year in passing upon the proposition of the plaintiff to dismissal in *Metro Subway, supra,* Judge Pratt was squarely confronted, as we have been in the appeal now before us, with the question of whether or not the 1984 amendments to the Longshore Act affected pending actions filed under the local act of 1928. In a well-reasoned opinion, he decided that as a result of the repealer to which we have adverted, the recent Congressional legislation did not affect such actions, being directed solely at the various kinds of maritime employment covered by the federal act of 1927 as amended. Accordingly, deeming *WMATA v. Johnson, supra,* 104 S. Ct. at 2827, still controlling with respect to the cases in the District Court, he dismissed them, although he did remark that the joint statement of the conferees is "somewhat ambiguous as to whether Congress was thinking of the Johnson litigation or the principle embodied in the *Johnson* decision."*In re Metro Subway Accident Referral, supra,* slip op. at 7 n.11.

In our view, Judge Pratt, in the absence of any wording in the new act referring to workers' compensation in the District, was fully justified in concluding that it was only the "principle" or rule of decision in *Johnson,* that had been overruled. There are numerous operations covered by the Longshore Act, *e.g.,* dry-dock overhaul of vessels, off-shore oil rigs, shipbuilding, etc., which require the services of literally scores of subcontractors. Obviously the unions representing workers on such projects — and credited in the reports of the House and Senate Committees as helping to shape the new legislation[20] would scarcely regard favorably any legal doctrine having ominous

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[20]*See* H.R. Rep. No. 98-579, 98th Cong., p. 2; S. Rep. No. 98-81, *id.* p. 23.

overtones with respect to successful litigation against general contractors in maritime industries.

Appellant has assailed the conclusion reached in *Metro Subway* on several grounds, none of which are persuasive. He argues that because the 1984 act specifically makes certain provisions inapplicable or limited with regard to the Black Lung Act and the Outer Continental Shelf Act – statutes also incorporating by reference portions of the Longshore Act – the absence of any similar reference to the 1982 District of Columbia Act indicates that Congress intended that its amendments were also applicable to the latter. The short answer to this contention is that there was no occasion for Congress to exclude expressly from the application of provisions of the new law any statute already repealed. Congress was certainly aware of the repeal of the 1928 act, for the Council legislation accomplishing such action had been submitted to Congressional review for the statutory period of 30 legislative days, and became law without the disapproval of either branch.[21]

Nor are we impressed by the argument that the Department of Labor, the federal agency entrusted with the administration of the Longshore Act, has indicated that the 1984 amendments are applicable to employees injured in the District of Columbia before the new local act became effective.[22] Appellant suggests that we should defer to this administrative construction. Such rule of deference with respect to administrative "expertise" is sometimes mentioned by the courts in sustaining an agency rule or ad-

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[21] *See D.C. Code* § 36-345 (Supp. 1984).

[22] Appellant relies upon published rules for adjudication promulgated by what was apparently a lower level of the department. With commendable candor, counsel for appellant informed us after oral argument that he had been mistaken in stating that the Solicitor of Labor had issued an opinion agreeing with his position.

judication, but is never employed with respect to statutory provisions limiting the time or scope of judicial review or the institution of lawsuits, as provisions dealing with the jurisdiction of the court are not within the province of an agency to interpret.

An examination of the 1984 act and its legislative history persuades us that Congress, in revising the Longshore statute, focused attention entirely upon difficulties encountered by maritime employers and employees under its then existing provisions. One of its major concerns was the broad scope of coverage which had resulted in overlapping claims under federal and state law. It solved this problem by excluding several categories of workers previously within the act, *e.g.*, employees of yachting marinas, shoreside museums and restaurants, builders of small boats, etc., leaving such persons to the coverage of state workmen's compensation laws.[23]

If a central purpose of the 1984 legislation was to remove from coverage substantial numbers of employees whose connection with maritime industries was too peripheral, it would be passing strange to infer that Congress meant the new act to cover persons injured in purely land based occupations. Plainly the President of the United States understood that the 1984 act affected only the maritime industry, for in giving it his approval, he stated in part:[24]

> I have today signed S. 38, the "Longshore and Harbor Workers' Compensation Act Amendments of 1984." The last amendments to this Act in 1972 expanded worker coverage and provided relatively high benefits which resulted in ex-

[23] Jt., Conf. Rep., *supra, Cong.*, Rec. II 9592-93, Sept. 14, 1984.

[24] *See Statement by the President, released by White House, September 28, 1984.*

cessive costs. Today's legislation addresses these issues and makes important reforms in workers' compensation for injured workers, who contributed so much to our Nation's *vital maritime industry,* and their families. . . .

I want to congratulate all the parties to this consensus legislation. Their efforts strike a balance between continuing to provide fair and necessary benefits for injured workers and their families and, at the same time, giving employers, insurers, and the Labor Department the means to control program costs more effectively. The bill will accomplish this by clarifying the Act's coverage to exempt certain categories of workers whose work activities are *on land,* putting reasonable limits on benefits, and increasing the penalties for fraud and abuse. (Emphasis supplied).

Affirmed.

APPENDIX C

In the
Superior Court for the District of Columbia
January 8, 1986
CA No. 14192-79

JOHN D. O'CONNELL
Plaintiff

vs.

MARYLAND STEEL ERECTORS, INC.
Defendant and Third Party Plaintiff

vs.

STEELE AND MORONEY, INC.
Third Party Defendant

ORDER

This matter having come before the Court for trial and the court thereupon having entertained a Motion to Dismiss for lack of jurisdiction and the court having reviewed the memoranda on the subject submitted by the plaintiff and defendant pursuant to the Pretrial Order, and the court having heard oral argument from all parties it is by the court this 8th day of January 1982. [*nunc pro tunc*] 16th day of December, 1981

ORDERED that the Complaint herein be and the same is hereby dismissed for failure of the plaintiff to file the suit within six months of accepting workmen's compensation pursuant to a formal award as required by U.S.C.A. 33 § 933b and it is further

ORDERED that the third party complaint herein is dismissed without prejudice, as moot.

HONORABLE SYLVIA BACON

Walter J. Murphy, Jr. Esquire
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William Burgy, Esquire
2000 L Street, N.W.
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1625 K Street, N.W.
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APPENDIX D

Relevant provisions from Pub. L. No. 98-426

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

Sec. 21. (a) Section 33(b) is amended to read as follows:

"(b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board."

EFFECTIVE DATE

Sec. 28. (a) Except as otherwise provided in this section, the amendments made by this Act shall be effective on the date of enactment of this Act and shall apply both with respect to claims filed after such date and to claims pending on such date.

APPENDIX E

Metro and Worker Liability

The Post's two editorials on the newly enacted Longshoremen and Harbor Worker's Act ["The Bill That Could Break Metro," Sept. 28; "Will They Let Metro Go Broke? Oct. 4] were replete with misrepresentations.

The editorials failed to explain why Metro faces potential liabilities — and they are only potential. They result from suits by workers who claim their health has been impaired due to Metro's negligence. The Post seems to believe that justice is best served by slamming the courthouse door in the face of diseased and injured workers, because their claims, if upheld by a court of law, would cost Metro money. That is a bizarre concept of justice.

Congress has not declared that Metro is negligent or that Metro must pay anything to these claimants. The newly enacted longshore act merely reaffirms the judicial interpretation from 1927 through 1984, when the Supreme Court issued a decision wholly out of keeping with nearly 60 years of jurisprudence. The new longshore act restores the law to its status prior to June by assuring injured workers access to court, where their claims will either be upheld or dismissed. If a court of law determines that Metro was not negligent, Metro's liability will not be $3.5 billion, or even $3.50.

As to workers recovering negligence awards in addition to compensation benefits, The Post should know that one is offset by the other, so that there is no double recovery. The offset was explained in the news story on the longshore act, as was the fact that Metro's actual financial liability, if any, is still to be determined by the courts.

The editorials' call for Congress to enact special legislation to insulate Metro from potential liability shows ex-

treme indifference to workers who allege that their health has been damaged – permanently in many cases – by the negligence of Metro. We all support Metro, want the system completed and the fares kept as low as possible. But I do not believe that Congress, or The Post's readership, believes that the way to achieve those laudable goals is by precluding injured men and women from having their day in court.

GEORGE MILLER
U.S. Representative (D-Cal.)
Chairman, Subcommittee on Labor Standards
Washington

Supreme Court, U.S.
FILED
FEB 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1216

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN D. O'CONNELL,
Petitioner,
v.
MARYLAND STEEL ERECTORS, INC.
and
STEELE & MORONEY, INC.,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION OF RESPONDENT STEELE & MORONEY, INC.

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STATEMENT REQUIRED BY RULE 28.1

Respondent Steele & Moroney, Inc. is a closely-held corporation that has no parent or subsidiary corporations, nor any corporate affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1216

JOHN D. O'CONNELL,

Petitioner,

v.

MARYLAND STEEL ERECTORS, INC.

and

STEELE & MORONEY, INC.,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

---

BRIEF IN OPPOSITION OF RESPONDENT STEELE & MORONEY, INC.

RELEVANT STATUTES

In addition to the statutes reproduced in the petition (Pet. at 2-4), the following statutory provisions are relevant:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933(b) (1982):

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to

compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

District of Columbia Workers' Compensation Act of 1979, § 46 (published at 27 D.C. Register 2541 (1980)):

An act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes, approved May 18, 1928 (45 Stat. 600; D.C. Code sec. 36-501-503) is hereby repealed.

STATEMENT OF THE CASE

Petitioner in this case seeks review of a unanimous decision of the District of Columbia Court of Appeals. That decision addressed a single narrow question: under the local District of Columbia workers' compensation statute, when may an injured non-maritime employee who has received a compensation award bring a third-party tort action for those same injuries? To answer that question, the Court of Appeals was required by the local compensation statute (the District of Columbia Workmen's Compensation Act of 1928 (the "1928 Act"))[1] to refer to the pertinent provisions of the national Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA").[2] (Section 36-501 of the local 1928 Act, now repealed, expressly provided that the provisions of the national LHWCA would be applicable to the District.)

Accordingly, applying the plain language of Section 33(b) of the LHWCA,[3] as construed by this Court in *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981), the Court of Appeals held that an injured worker must

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[1] D.C. Code §§ 36-501 to -503 (1973) (repealed 1982).

[2] 33 U.S.C. §§ 901 *et seq.* (1982).

[3] 33 U.S.C. § 933(b) (1982) (reprinted at pages 1-2, *supra*).

bring any third-party tort action within six months of the date of any compensation award. (After six months, the right of action is assigned to the worker's employer.) Inasmuch as petitioner did not bring his current tort action within the applicable six-month period, the Court of Appeals determined that the action did not lie.

In reaching this determination, the Court specifically rejected petitioner's contention that Congress' 1984 amendment to Section 33 of the LHWCA conferred a right to bring this tort action even after expiration of the statutory six-month period.[4] As the Court noted, in 1979 the City Council of the District of Columbia enacted a new workers' compensation law for the District ("the New D.C. Act")[5] and in § 46 of that Act (reprinted at page 2, *supra*) the Council repealed the 1928 Act. As a result of this repeal, the Court found, "the Council divorced the local workers' compensation system entirely from the Longshore Act . . . ." Pet. App. at 15a. Therefore, according to the Court, "as the 1928 Act was no longer on the books, what Congress subsequently did to the Longshore statute [in the 1984 LHWCA Amendments] did not affect any rights" of petitioner. *Id.* at 17a. Furthermore, the Court held, while Congress could have overturned the repeal of the 1928 Act and directly legislated for the District of Columbia through the 1984 LHWCA Amendments, nothing in the language or legislative history of those amendments indicates that Congress intended to do so.[6]

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[4] Section 21(a) of the 1984 LHWCA Amendments revised Section 33(b) such that although an injured employee's right to sue is still assigned to his employer six months after the employee receives a compensation award, if the *employer* does not bring suit within 90 days, the right of action reverts back to the employee for the remainder of the limitations period. Pet. at 3; *see* 33 U.S.C.A. § 933(b) (1986).

[5] D.C. Code §§ 36-301 *et seq.* (1981).

[6] The City Council repealed the 1928 Act pursuant to authority granted it by Congress through the Home Rule Act. *See* D.C. Code

The Court therefore concluded that under the applicable provision of the local compensation law (*i.e.*, Section 33(b) of the LHWCA as applied to the District under the 1928 Act), petitioner's right to bring a tort action had been assigned to his employer and his current action was therefore properly dismissed. Petitioner's request for rehearing or a rehearing *en banc* was denied on October 21, 1985, and his petition for a writ of certiorari was filed on January 17, 1986).

SUMMARY OF ARGUMENT

The Court should deny the present petition for three reasons. First, this case concerns issues of local law that apply exclusively to the District of Columbia. No sound reason exists for this Court to depart from its well-established practice of deferring to the District of Columbia Court of Appeals' resolution of such local matters. Second, the substance of those local matters does not in any case merit this Court's review: the matters are not of great importance, will have little or no application other than to a limited number of cases in the District of Columbia, and have been resolved in the same way by every court that has considered them. Finally, the Court of Appeals' decision is in any event clearly correct and is firmly supported by the language, legislative histories, and purposes of the applicable statutes. The petition should therefore be denied.

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§ 1-227 (1981). Congress approved the City Council's new worker-compensation legislation by failing to veto that legislation during the 30-day period provided for under the Home Rule Act. *See* D.C. Code § 1-233(c)(1). The City Council's authority to adopt new worker compensation legislation for the District—including the repeal of the 1928 Act—was specifically upheld in *District of Columbia* v. *Greater Washington Cent. Labor Council*, 442 A.2d 110 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983).

REASONS FOR DENYING THE WRIT

1. The Court Should Defer To the Court of Appeals' Decision In This Local Law Case.

Assuming that this Court has jurisdiction to review the decision below,[7] the Court should not agree to do so. This Court has repeatedly enunciated its strong policy of deferring to decisions by the District of Columbia Court of Appeals concerning local issues of law. This is plainly a case where such deference is appropriate.

Non-maritime employees in the District (such as petitioner) who sustained injuries prior to July 26, 1982 derived their worker-compensation rights from the local 1928 Act, not from the LHWCA.[8] This is so even though the 1928 Act incorporated the LHWCA's substantive provisions; the 1928 Act is nevertheless a "comprehensive legislative scheme" that is entirely distinct from the national LHWCA[9] and is "a local law . . . rather than a

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[7] As the jurisdictional basis for his petition, petitioner relies on 28 U.S.C. § 1257(3). That Section provides for review by this Court of state court judgments "[b]y writ of certiorari, where the validity of a . . . statute of the United States is drawn in question . . ." (Pet. at 4). Yet the Court of Appeals did not question the *validity* of *any* statute. Rather, the Court simply held that amendments to a national statute (the LHWCA) had no impact on cases arising under a separate, local act (the 1928 Act). *All* of the statutes relevant to the case—whether federal or local—remain *fully valid* under the Court of Appeals' decision. Inasmuch as the Court's jurisdiction under Section 1257(3) is therefore doubtful at best, the petition may be properly denied on that ground alone.

[8] It is settled that claims arising prior to the effective repeal of the 1928 Act (July 26, 1982) are governed by that Act, while subsequent claims are governed by the New D.C. Act. *E.g., Garrett* v. *Washington Air Compressor Co.*, 466 A.2d 462, 462 n.1 (D.C. 1983); *Carey* v. *Crane Service Co.*, 457 A.2d 1102, 1103 n.2 (D.C. 1983). *Accord, e.g., Randall* v. *Comfort Control, Inc.*, 725 F.2d 791, 792 n.1 (D.C. Cir. 1984).

[9] *Harrington* v. *Moss*, 407 A.2d 658, 660 (D.C. 1979); *Gudmundson* v. *Cardillo*, 126 F.2d 521, 525 (D.C. Cir. 1942). *Accord Cardillo*

federal law . . . [that] always has been regarded by the courts as a 'local act' and construed as a state law." [10]

The issue of petitioner's ability to bring this third-party action more than six months after his receipt of a compensation award under the 1928 Act is therefore plainly a local law question, affecting only non-maritime employee cases arising in the District. Likewise, the intent of the City Council in repealing the 1928 Act, including the question whether that repeal was intended to preclude application of future LHWCA amendments to the District, is also a local issue. Finally, the question whether Congress nevertheless intended the 1984 LHWCA Amendments to affect the ability of workers covered by the 1928 Act to commence tort actions more than six months after receipt of a compensation award raises only issues of local application.[11]

Thus, the question raised by the petition—whether the City Council or Congress intended the 1984 LHWCA Amendments to apply to this case—turns exclusively on matters *uniquely affecting the District of Columbia.* This Court could decide that question only by resolving certain peculiarly local issues, *i.e.*, (1) the intent of the City Council in repealing the local 1928 Act and (2) whether Congress intended to override that repeal in the 1984 LHWCA Amendments and again act as local legislator for the District. No sound reason has been advanced for this Court to undertake review of such issues; the Court should therefore follow its well-established policy of de-

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v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 470-71, 477 (1947) (construing case as one governed by the 1928 Act).

[10] *District of Columbia* v. *Greater Washington Cent. Labor Council, supra,* 442 A.2d at 116.

[11] It is well-settled that the construction of Congressional action as it peculiarly affects the District of Columbia raises local questions most appropriately resolved by the local D.C. courts. *See Pernell* v. *Southall Realty,* 416 U.S. 363, 366-69 (1974); *Busby* v. *Electric Util. Employees Union,* 323 U.S. 72, 74-75 (1944).

ferring to the Court of Appeals "on matters of exclusively local concern" [12] and deny the petition.[13]

2. The Questions Raised by This Case Do Not Merit Review by This Court.

Even if this Court were not inclined to deny review in deference to the Court of Appeals, it is clear that this case does not present issues that merit this Court's attention. The case does not involve a decision that is (1) at variance with other court decisions or (2) that raises an

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[12] *Whalen* v. *United States*, 445 U.S. 684, 687 (1980). *Accord United States* v. *Frady*, 456 U.S. 152, 159 (1982); *Pernell* v. *Southall Realty*, 416 U.S. 363, 366, 369 (1974) (deference is owed to local District of Columbia courts "save in exceptional situations where egregious error has been committed"; review should be denied "absent a constitutional claim or a problem of general federal law of nationwide application").

[13] Because the Court of Appeals ruled that the 1984 LHWCA Amendments are inapplicable in 1928 Act cases, it expressly and properly declined to reach the other question raised in the petition: whether the "relation back" doctrine (developed principally under Fed. R. Civ. P. 15(c)) should be invoked, evidently by analogy, to allow petitioner's otherwise-untimely action to proceed. Pet. App. at 13a. This second question *assumes* that the 1984 LHWCA Amendments *do apply* to this case; it would therefore be reached *only* if the Court were to conclude that the Court of Appeals was incorrect in holding the 1984 Amendments inapplicable to the District of Columbia. Contrary to petitioner's suggestion, therefore, his "relation back" question is *not* an *independent* basis for reviewing the decision below on certiorari.

Furthermore, even if the 1984 LHWCA Amendments were thought applicable to the District, petitioner's "relation back" question would still not be presented by this case. By their own terms, the 1984 Amendments expressly apply to "claims pending" on the date of their enactment. Pet. App. at 3. Thus, the question whether this case could ever be subject to the 1984 Amendments turns on the Amendments' "claims pending" language, not the "relation back" rule. The meaning of "claims pending" has neither been briefed by the parties in this case, nor addressed by the courts below.

important national issue. As such, under this Court's criteria the case is not worthy of review on certiorari,[14] regardless whether it is deemed local or federal in nature.

First, the Court of Appeals' decision not only does not conflict with other decisions, it is in *full agreement* with *every one* of the numerous courts that have addressed the issue of the applicability of the 1984 Amendments to 1928 Act cases.[15]

Second, the case plainly does not present an important question of federal law. As we have noted, the issues raised here concern only *local* workers' compensation law in the District of Columbia. The class of employees affected by the Court of Appeals' decision is narrow and finite, *i.e.*, non-maritime employees in the District who sustained injuries prior to July 26, 1982. District employees injured after that date are governed by a dif-

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[14] Such review is appropriate (1) where a state court of last resort has decided a case in a way that is in conflict with decisions of other state courts or federal appeals courts, or with this Court's own applicable decisions, or (2) where the case presents important issues of federal law. *See generally* Supreme Court Rule 17.

[15] The Court of Appeals cited three federal district court decisions which agreed with its analysis: *In re Metro Subway Accident Referral*, Misc. No. 82-306 (D.D.C. Dec. 18, 1984), *appeal filed*, No. 85-5029 and consolidated cases (D.C. Cir.); *Stokes* v. *George Hyman Constr. Co.*, C.A. No. 84-1418 (D.D.C. Jan. 18, 1985), *appeal filed*, No. 85-5147 (D.C. Cir.); and *Lehew* v. *AFGO Eng'g Corp.*, C.A. No. 81-1593 (D.D.C. Feb. 27, 1985), *appeal filed*, No. 85-5304 (D.C. Cir.). For other decisions in full agreement with the Court of Appeals' holding, *see Holmes* v. *Leon N. Weiner & Assoc., Inc.*, 603 F. Supp. 122, 124 n.4 (D.D.C. 1985); *Estep* v. *Construction Gen., Inc.*, C.A. No. 126-81 (D.C. Sup. Ct. Apr. 3, 1985); *Montag* v. *Fischbach & Moore Corp.*, C.A. No. 4643-83 (D.C. Sup. Ct. Feb. 13, 1985); *Hatter* v. *George A. Fuller Co.*, C.A. No. 9089-80 (D.C. Sup. Ct. Dec. 21, 1984); *Pryor* v. *James McHugh Constr. Co.*, Case Nos. 85-LHC-114 (Dep't of Labor, Aug. 20, 1985); and *McNeill* v. *WMATA*, Case Nos. 84-DCWC-51, 522 (Dep't of Labor, Feb. 22, 1985).

ferent local statute (the New D.C. Act) and so are unaffected by this case. Moreover, because the case does not involve construction of *any* of the LHWCA's *substantive* provisions, maritime workers covered by the national LHWCA are completely unaffected by the decision. The case, therefore, concerns nothing more than routine application of a local statute plainly requiring that tort actions be brought by an employee within six months of a compensation award, and thereafter be brought by his employer.

As a narrow decision by the highest local court on a local worker-compensation issue—a decision that is in full accord with all other relevant decisions—the case clearly does not merit review on certiorari.

3. The Court of Appeals Correctly Interpreted the Applicable Statutes.

Finally, the Court of Appeals' decision is a correct one that is firmly grounded in the plain terms and the legislative histories of the relevant statutes. Respondent Maryland Steel Erectors has presented the Court with a thorough analysis of the Court of Appeals' opinion that plainly demonstrates that the decision is well-reasoned. *See* Opposition to the Petition for Writ of Certiorari to the District of Columbia Court of Appeals of Respondent Maryland Steel Erectors, Inc. at 7-11. That analysis, adopted herein by reference, presents a third, independent reason why the petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: February 18, 1986

CERTIFICATE OF SERVICE

I, Gary W. Brown, a member of the Bar of this Court, hereby certify that three (3) copies of the "Brief in Opposition of Respondent Steele and Moroney, Inc." were mailed, first-class postage prepaid, this 18th day of February, 1986, to:

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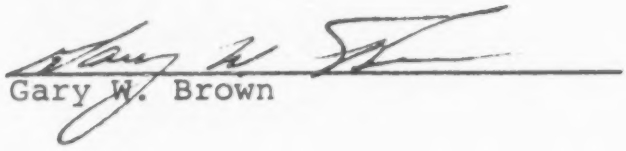

Gary W. Brown

Supreme Court, U.S.
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CLERK

No. 85-1216

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHN D. O'CONNELL,
Petitioner,

v.

MARYLAND STEEL ERECTORS, INC., *et al.*,
Respondent.

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

Whether a tort action brought by a worker against a third party, on a negligence theory, may proceed after the Statute of Limitations in the District of Columbia Workmen's Compensation Act has run.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below in the District of Columbia Court of Appeals were Petitioner John D. O'Connell, Respondent Maryland Steel Erectors, Inc. and Steele and Morooney, Inc. which was a third-party defendant and appellee in the Courts below.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1216

JOHN D. O'CONNELL,

Petitioner,

v.

MARYLAND STEEL ERECTORS, INC., *et al.*,

Respondent.

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Respondent, Maryland Steel Erectors, Inc., respectfully requests that this Court deny Petitioner's request for Writ of Certiorari to review the Decision and Order of the District of Columbia Court of Appeals dismissing Petitioner's Appeal from an Order of Summary Judgment and denying a Petition for Rehearing and/or Suggestion for Rehearing En Banc and Order denying a Motion to Stay the issuance of mandate. 495 A.2d 1134 (D.C. 1985), reh'g denied, No. 82-1486 (D.C. Oct. 21, 1985), (Order filed February 4, 1986).

OPINIONS BELOW

On the day of trial, a District of Columbia Superior Court Judge granted Summary Judgment in favor of the defendant Maryland Steel Erectors, Inc. on the authority of this Court's holding in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981). Appendix D.

Petitioner appealed to the District of Columbia Court of Appeals which affirmed the granting of Summary Judgment. Appendix C. The District of Columbia Court of Appeals has denied Petitioner's request for Rehearing En Banc (Appendix B) and has denied Petitioner's Motion to Stay issuance of mandate. Appendix A.

JURISDICTION

Petitioner invokes jurisdiction of this Court pursuant to 28 U.S.C. §1257(3) (1976). Respondent disputes this Court's jurisdiction to hear this case and contends that the legal issues presented below involves application of local laws of the District of Columbia and does not involve a federal question that should concern this Court. This issue regarding jurisdiction is more fully set out in Respondent's Reasons for Denying the Petition below.

STATEMENT OF THE CASE

The Petitioner, John D. O'Connell, was injured during the course of his employment and was awarded Workmen's Compensation benefits due to his injuries. Eight months after he was awarded the benefits, Petitioner commenced this civil action against Respondent Maryland Steel Erectors, Inc. in the Superior Court for the District of Columbia.

On December 16, 1981, the trial court granted Respon-

dent's Motion for Summary Judgment as Petitioner had not commenced his action within the required six-month Statute of Limitations under 33 U.S.C. §933(b). The Court based its decision on *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981). In 1984, while Petitioner appealed the trial court's decision, Congress amended the Federal Longshoremen's and Harborworker's Compensation Act, §933(b) Pub. L. No. 98-426, 98 Stat. 1639 (1984) which would have allowed Petitioner to proceed with his cause of action under the Federal Act, if applicable in the District of Columbia.

On July 5, 1985, the District of Columbia Court of Appeals upheld the Superior Couret's entry of Summary Judgment in favor of the Respondent. The Court held that the 1984 Amendments to the Federal Longshoremen and Harborworkers' Act are inapplicable to the District of Columbia Workmen's Compensation Act as the District of Columbia's Act was a purely local one and that Congress had not explicitly applied the Amendments to the District of Columbia, which it was empowered to do. The Court further rejected Petitioner's claim that *Rodriguez* was inapplicable to the present action, and, therefore, upheld the Summary Judgment.

The District of Columbia Court of Appeals sitting *en banc*, denied Petitioner's Petition for a Rehearing En Banc on October 21, 1985. On February 4, 1986, the District of Columbia Court of Appeals issued a Per Curiam Order denying Petitioner's Motion to Stay issuance of the mandate.

REASONS FOR DENYING THE PETITION

Respondent respectfully submits that the legal issues presented below involves application of local law and not

a federal question that should concern this Court in Review. In support of its Petition, Respondent states as follows:

I. THE LEGAL ISSUES RAISED IN THE CASE BELOW INVOLVE THE APPLICATION OF LOCAL LAW OF THE DISTRICT OF COLUMBIA REGARDING TORT ACTIONS AGAINST THIRD PARTIES UNDER THE DISTRICT OF COLUMBIA WORKER'S COMPENSATION ACTS. D.C. CODE §36-501 (1973).

The underlying suit upon which the Petition is based is a tort action for negligence. Such a cause of action arises under the common law of the District of Columbia. Petitioner also was awarded Worker's Compensation benefits out of the same incident, therefore, his remedies are also controlled by the Longshoremen and Harborworkers' Compensation Act, 33 U.S.C. §901, *et seq.* (1982) (LHWCA) as made applicable to the District of Columbia by the District of Columbia Worker's Compensation Act, D.C. Code §§36-501, *et seq.* (1973). Respondent was granted Summary Judgment under the Worker's Compensation Act as Petitioner had not commenced his action within the prescribed Statute of Limitations. Petitioner argued that Amendments to the Federal LHWCA by Congress in 1984[1] were applicable to the local District of Columbia Worker's Compensation Act. The District of Columbia Court of Appeals rejected Petitioner's arguments and affirmed Summary Judgment by ruling that the D.C. Act was one of local application and, therefore, the Congressional Amendments to the Federal Statute were inapplicable in the District of Columbia.

Such a holding is within line with several United States Court of Appeals and District of Columbia Court of Ap-

[1]Pub. L. No. 98-426, 98 Stat. 1639 (1984).

peals cases which have held that the District of Columbia Worker's Compensation Act is a Congressional enactment of a local District of Columbia Statute dealing exclusively with local matters. *Gudmondson v. Cardillo,* 75 U.S. App. D.C. 230, 126 F.2d 521 (1942); *Director of Wkrs' Comp. v. National Van Lines, Inc.,* 198 U.S. App. D.C. 239, 613 F.2d 972 (1979). *District of Columbia v. Greater Washington, (D.C.,* App.) 442. A.2d 110, hearing *en banc* denied, 445 A.2d 960 (D.C. 1982), *cert. denied,* 460 U.S. 1016 (1983). Furthermore, the District of Columbia Court of Appeals has held that the District of Columbia City Council was within its legislative authority under the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code §§1-201 *et seq.* (1981) when it enacted the District of Columbia Workmen's Compensation Act of 1979, D.C. Code §§36-307 *et seq.* (1981) and repealed existing Workmen's Compensation Statutes applicable to the private sector in the District of Columbia, *Ibid.* Therefore, the District of Columbia Court of Appeals was correct in its holding and was following precedent of United States Court of Appeals for the District of Columbia and its own precedent.

This Court has several times recognized its policy not to interfere with local rules of law fashioned by the Courts of the District of Columiba. *Miller v. United States,* 78 S. Ct. 1190, 357 U.S. 301, 2 L.Ed.2d 1332 (1958). *Pernell v. Southall Realty,* 94 S. Ct. 1723, 416 U.S. 363, 40 L.Ed.2d 198 (1974). *Fisher v. United States,* 66 S. Ct. 1318, 328 U.S. 463 (1946). Respondent urges this Court to apply this policy regarding this case which is one of local statutory construction.

II. PLAINTIFF HAS NO STANDING TO BRING THE PRESENT ACTION AS THE STATUTE OF LIMITATIONS HAS RUN AS DECIDED BY THIS COURT IN RODRIGUEZ V. COMPASS SHIPPING CO.

Petitioner relies upon the 1984 Amendment to the LHWCA to resurrect his cause of action. However, since the 1984 amendments apply only to the Fedreal LHWCA Act, the District of Columbia Court of Appeals upheld summary judgment against Petitioner as he had not filed his action within the statutory period. The Court relied upon *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981) which held the running of the six-month period barred any suits not commenced by the employer or his subrogee. Petitioner argued that *Rodriguez* should not be read retroactively and that the Court of Appeals must follow the precedent of one local case which allowed a suit to commence beyond the six-month limit. *Potomac Electric Power Co. v. Wynn*, 120 U.S. App. D.C. 13, 343 F.2d 295 (1964).

The District of Columbia Court of Appeals did not violate its self-imposed decision to use decisions of the United States Court of Appeals for the District of Columbia made prior to 1971 as precedent. *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971). The Court noted that it has applied *Rodriguez* in two other cases thus not violating precedent. *Dodson v. Washington Automotive Co.*, 461 A.2d 1020 (D.C. 1983). *Milligan v. Brian Construction Co.*, 485 A.2d 593 (D.C. 1984). Also, the Court's retroactive application of *Rodriguez* was appropriate within that Court's and this Court's guidelines for such application. *United States v. Johnson*, 457 U.S. 537 (1982).

The District of Columbia Court of Appeals decision on how to use precedent is, once again a local rule. Respon-

dent urges this Court to follow its past decisions not to interfere with such rule making.

III. THE COURT OF APPEALS' DECISION CORRECTLY CONSTRUED THE APPLICABLE STATUTES.

Finally, the well-reasoned decision of the Court of Appeals is in any event correct and, for that reason alone, the petition should be denied.

In reaching its decision that the 1984 LHWCA Amendments are not applicable to 1982 Act cases, the Court of Appeals began its analysis by noting that pre-1982 compensation cases in the District "deriv[e] entirely from the [1928 Act]." Pet. App. at 14a. After observing that the 1982 Act made "the provisions" of the LHWCA, "including future amendments thereto," applicable to District nonmaritime employees, the Court further noted that "the 1928 Act – one of purely local application – was expressly repealed by an act passed by the District Council in 1980 [*i.e.*, the New D.C. Act]," Pet. App. at 14a.[2]

That repeal, the Court held, was of crucial importance in determining whether the 1984 LHWCA Amendments applied to this and other 1982 Act cases; for "[h]ad it not been for the repealer, the 1928 act would indeed have incorporated those amendments, including the revisions of Section 33." Pet. App. at 17a. The *repeal* of the 1928 Act – including its provision incorporating future LHWCA Amendments – changed the analysis, however: "as the 1928 Act was no longer on the books, what Congress subsequently did to the [LHWCA] did not affect any rights created by [the 1928 Act]." Pet. App. at 17a.

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[2]The repeal of the 1928 Act was contained in Section 46 of the New D.C. Act. *See* Pet. App. at 14a, n.12.

Workers injured before July 26, 1982 (the effective date of the 1982 Act's repeal), however, are "still covered" by the 1928 Act by virtue of the applicable D.C. saving statute, 1 U.S.C. § 109.[3] Pet. App. at 16a. This is because, as the Court of Appeals stated, the saving statute operates to "preserv[e]" legitimate claims of workers "incurred" under the 1928 Act prior to its repeal. Pet. App. at 17a. The Court of Appeals emphasized that the crucial language in the saving statute provides that a repealed statute is to be "treated" as still in force " *'for the purpose of sustaining any proper action.'* " Pet. App. at 16a (quoting 1 U.S.C. § 109 (emphasis added by the Court). Hence, inasmuch as Petitioner had no "proper action" in tort under the 1928 Act more than six months after his compensation award, the Court of Appeals concluded that the saving statute could not "save" a right that Petitioner *never had.* In noting this key limitation on the scope of the saving statute, the Court of Appeals squarely applied this Court's analysis of the saving statute in *De La Rama Steamship Co. v. United States,* 344 U.S. 386, 389 (1953), wherein the Court underscored the "precise purpose" of the saving statute, *i.e.,* preserving "*existing* rights." (Emphasis added).[4]

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[3]The saving statute is reproduced at Pet. at 4. *See also* Pet. App. at 16a. As a general act of Congress, Section 109 is applicable to the District by virtue of D.C. Code § 49-301. Pet. App. at 16a, n.16.

[4]That a saving provision preserves only existing rights and does not serve as a means for creating new rights is a well-established principle of law. *See, e.g., Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149, 162 (1920); *The Irresistable,* 20 U.S. (7 Wheat.), 551, 551-52 (1822); *Solomon* v. *United States,* 276 F.2d 669, 673 (6th Cir.), *cert. denied,* 364 U.S. 890 (1960). *See also Marquardt* v. *Stark,* 239 Minn. 107, 58 N.W.2d 273, 277 (1953); *Shanken* v. *Township of Upper Moreland,* 203 Pa. Super. 323, 201 A.2d 249, 252 (1964).

The Court of Appeals did not end its inquiry with the intent of the Council and Congress in repealing the 1928 Act; it also examined the legislative history of the 1984 Amendments to determine whether Congress intended those Amendments to affect local D.C. law notwithstanding the 1928 Act's repeal. On this issue the Court determined that there is *no evidence* that Congress intended that its revisions to the *national* LHWCA would affect cases under the repealed 1928 Act as well. Pet. App. at 20a-23a.[5] The Court found no language in the 1984 Amendments referring to the District of Columbia or to the 1928 Act specifically. Pet. App. at 20a. Moreover, the Court's "examination of the 1928 act and its legislative history [revealed] that Congress, in revising the Longshore statute, focused attention entirely upon difficulties encountered by maritime employers and employees." Pet. App. at 22a.[6] The Court further found that a "central purpose" of the Amendments was to remove nonmaritime employees from the national LHWCA's coverage. Pet. App. at 22a. The Court therefore concluded that it would be "passing strange" to hold that Congress intended the Amendments to apply *sub silentio* to all land-based District employees

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[5]Contrary to Petitioner's assertion (Pet. at 12-14), nothing in the Court of Appeals' decision suggests that Congress could not have legislated for the District and revived the 1928 Act had it chosen to do so. Nor does anything prevent Congress from so acting today: both the Constitution and the Home Rule Act expressly reserve to Congress plenary legislative power over the District. U.S. Const. art. I, § 8, cl. 17; D.C. Code § 1-206. The Court of Appeals simply held that Congress did not exercise its local legislative powers in this instance.

[6]Petitioner's reliance on a post-enactment letter to the editor of the *Washington Post* by a Member of Congress as support for the proposition that Congress intended the 1984 Amendments to affect local District law (Pet. at 12; Pet. App. at 27a-28a) is completely misplaced. This Court has repeatedly stated that post-enactment statements of legislators are unreliable guides to legislative intent. *E.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

previously covered by the repealed 1928 Act. Pet. App. at 22a.[7]

Thus, the Court of Appeals concluded that the City Council's and Congress' repeal of the 1928 Act carried out the plain meaning of the word "repeal," *i.e.*, that further amendments to the national LHWCA would no longer apply to local worker-compensation matters in the District of Columbia. The Court also concluded that Congress did not intend to override that repeal through the 1984 LHWCA Amendments and once again become a local legislature for such matters. These conclusions of the Court of Appeals turn on strictly local questions, are consistent with the decisions of all other courts on those questions,

---

[7]Petitioner argued in the court below that certain regulations promulgated by the Department of Labor purporting to apply the 1984 LHWCA Amendments to 1928 Act *compensation claim* proceedings constitute persuasive contrary authority. There are several responses to this argument. First, as the Court of Appeals held, the question whether the 1984 Amendments apply to 1928 Act cases is a purely legal one as to which the Department has no special expertise and so deserves minimal deference. *See* Pet. App. at 21a-22a. *Accord, e.g., FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). Second, the Department's analysis of this issue blatantly flouts not only the Court of Appeals' decision, but also decisions of several judges of the United States District Court for the District of Columbia and at least two of the Department's own Administrative Law Judges. *See* 51 Fed. Reg. 4270 (Feb. 3, 1986); note ____, *supra*. That an agency would refuse to follow applicable judicial decisions by pronouncing them "unsound" in a Federal Register notice (51 Fed. Reg. at 4272) is, to say the least, surprising. Respondents suggest that it is *the courts* which ultimately interpret the law and ultimately determine the soundness of agency opinions, not the other way around. Finally, even assuming that the Department's opinion on this issue should be given any weight, the Department's jurisdiction over 1928 Act matters is plainly limited to deciding *compensation claim* disputes. Its regulations necessarily apply *only* in that context and are irrelevant to the instant question of *third-party causes of action* under the 1982 Act.

present no issues of national importance, and, moreover, are clearly correct. They do not merit review by this Court.

CONCLUSION

Wherefore, the Respondent, Maryland Steel Erectors, Inc. prays that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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February 18, 1986

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 82-1486
JOHN D. O'CONNELL, Appellant,
v. CA14192-79

MARYLAND STEEL ERECTOR, INCORPORATED, et al., Appellees.

BEFORE: Nebeker and Fertten, Associate Judges, and Reilly, Senior Judge.

ORDER

On consideration of the motion to stay issuance of mandate, and the joint opposition of appellee, et al., thereto, it is

ORDERED that the motion is denied and the Clerk is directed to issue the mandate forthwith. Unlike cases in which a judgment for damages or for an equitable or agency remedy is affirmed, refusal of the court to stay the mandate in this case does not impose any harm upon movant

or prejudice in any way his prospects for favorable action in a certiorari application.

PER CURIAM

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 82-1486
JOHN D. O'CONNELL, Appellant,
v. CA14192-79

MARYLAND STEEL ERECTOR, INCORPORATED, et al., Appellees.

BEFORE: Pryor, Chief Judge; *Nebeker, Mack, Newman, *Ferren, Belson, Terry, and Rogers, Associate Judges; *Reilly, Chief Judge, Retired.

ORDER

On consideration of appellant's petition for rehearing and/or rehearing en banc, and the resposnes thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Associate Judges Newman and Rogers would grant rehearing en banc.

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District of Columbia
Court of Appeals
Filed Oct 21 1985

APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS
No. 82-1486
John D. O'Connell, Appellant,

v.

Maryland Steel Erectors, Inc., et al, Appellees

Appeal from the Superior Cout
of the District of Columbia

(Hon. Sylvia Bacon, Trial Judge)

(Reargued April 1, 1985 Decided July 5, 1985)

Peter J. Vangsnes for appellant, *William C. Burgy* and *Karl N. Marshall* were on the briefs, for appellant.

Walter J. Murphy, Jr., with whom *Hugh W. Farrell* entered an appearance, for appellee Maryland Steel Erectors, Inc.

Gary W. Brown, entered an appearance for appellee Steele & Moroney, Inc.

Walter A. Smith, Jr., with whom *Vincent H. Cohen* and *Robert B. Cave* were on the briefs for *amicus*, Washington Metropolitan Area Transit Authority.

Before Nebeker and Ferren, *Associate Judges*, and Reilly, *Chief Judge, Retired.*

Reilly, *Chief Judge, Retired:* This is an appeal from the dismissal of an action for negligence brought by a construction worker against the corporate owner of a rotating crane on a building project where he had suffered chest and shoulder injuriesa. Eight months prior to commencing such action, he had been formally awarded workmen's

compensation pursuant to a disability claim filed against his own employer, the contractor who had hired him to work on the site. At the time of the injury, the District of Columbia workers' compensation statute incorporated by reference the provisions of the Longshoremen's and Harbor Workers' Compensation Act of 1927, as amended, 33 U.S.C. § 901 *et seq.*, one of which, Section 33(b)[1] allowed a disability claimant, even after accepting workmen's compensation, to sue a person other than his employer within six months after the award. If he failed to do so, his right of action under this subsection was assigned to his employer.

In the instant case, as appellant had let the six-month deadline elapse before beginning his action, the trial court granted a motion to dismiss, observing that in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981), it was established that the running of the six-month period barred any suits not initiated by the employer or his subrogee.[2]

[1]33 U.S.C. § 933(b) (1982). This particular subsection was one of the amendments passed by Congress in 1959 to the Longshore Act. Prior to its enactment, a disabled worker was confronted with a choice of remedies. He could file a claim against his own employer for statutory compensation, irrespective of negligence, or sue a third party whose conduct caused the injury – but he could not do both. If the worker elected and received compensation, the employer or his insurance carrier under subrogation principles then could sue a third person deemed responsible for the accident for reimbursement.

[2]In *Rodriguez*, the Supreme Court had granted certiorari to resolve a conflict between the Courts of Appeal of the Second and Fourth Circuits between the Courts of Appeal of the Second and Fourth Circuits on the interpretation of Section 33(b) of the Act. Just eight days after the Second Circuit had decided that when injured longshoremen failed to bring suit within six months, the employer to whom their claims had been asssigned thereafter had the exclusive right to pursue third-party claims, the Fourth Circuit issued an opinion to the contrary in *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980). Its holding was that if the assignee chose not to sue, the disabled workers by appropriate pleadings could gain reassignment of their cause of action.

Citing *Rodriguez*, we reached the same conclusion in two similar cases, *Dodson v. Washington Automotive Co.*, 461 A.2d 1020 (D.C. 1983) and *Milligan v. Brian Construction Development Co.*, 485 A.2d 593 (D.C. 1984). We are now urged to vacate the order of the trial court and remand the case for trial on the grounds that (1) *Rodriguez* is not controlling with respect to litigation commenced before the release of that opinion, and (2) in any event a Congressional amendment to the Longshore statute (which became law during the pendency of this appeal) has breathed a new life into the dismissed action. Deeming neither of the grounds urged for reversal as persuasive, we affirm.

I

In developing his first ground, appellant asserts that the motions court in this case should have deferred to *Potomac Electric Power Co. v. Wynn*, 120 U.S. App. D.C. 13, 343 F.2d 295 (1964). He points out that this decision of the United States Court of Appeals for this circuit was not specificallay disapproved by the Supreme Court until it handed down its *Rodriguez* opinion in 1981, more than a year after appellant had begun his action in the Superior Court. In the *Wynn* cae, the plaintiff waited for sixteen months after being awarded compensation benefits before filing an amended complaint against PEPCO. The appellate court affirmed the denial of a motion to dismiss. It recognized that after the six-month period had run, the right to recover the compensation award was assigned to the employer who had paid it, but nevertheless that if such assignee then failed to exercise such right — for any reason — the injured employee was not precluded from suing.

In arriving at this conclusion — seemingly at odds with the actual wording of the statutory language interpreted —

the court cited *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956), a case which antedated the 1959 amendments to Section 33.[3] In *Czaplicki,* the petitioner's rights of action against third parties were assigned by the act to his employer after he accepted compensation under an award. The employer's insurer, Travelers Insurance Company, was in turn subrogated to those rights. Travelers, however, was also the insurer of one of the third parties subject to suit. Thus, facing additional liability if such right of actin was successfully asserted, it had no reason to bring suit. The Supreme Court held that where the assignee's interests are in conflict with those of the employee, the latter had a cause of action against a negligent third party, despite the prior assignment.

But by holding that an employee can bring suit against a third party whenever the employer-assignee fails to do so, the *Wynn* decision went considerably beyond *Czaplicki.* Professor Larson described *Wynn* as the "most extreme extension" of *Czaplicki.*[4] It also seems that the *Wynn* opinion missed the point of the 1959 amendment to Section 33, which was to protect employees in *Czaplicki* situtions by affording them a right to sue independently for a six-month period.

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[3]Section 33(b), 33 U.S.C. *(b), reads as follows:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all rights of the person entitled to the compensation to recover damages against such third person unless such third person commence within six months after such award.

[4]2a A. A. LAWSON'S, WORKMEN'S COMPENSATION LAW § 75.47 at 14.555(1982).

Appellant's position, however, is that irrespective c whether or not *Wynn* was properly decided, it was still th law of this jurisdiction when he commenced his action, fo under the policy of this court enunciated in *M.A.P.* v *Ryan*, 285 A.2d 310, 312 (D.C. 1971), decisions of th United States Court of Appeals for this circuit rendered prior to February 1, 1971, "like the decisions of this court constitute the case law of the District of Columbia."[5] From this premise, he argues that the dismissal of his action on the authority of *Rodriguez* gave retroactive impact to that decision in circumstances which the Supreme Court itself had deemed unjust. He distinguishes our holding in *Dodson* and *Milligan, supra,* which also treated *Rodriguez* as controlling, on the ground that the issue of retroactivity was not specifically addressed in those opinions – as it had not been raised by the unsuccessful plaintiffs.

The problem of drawing a line between the kind of appellate decisions which should be deemed purely prospective, rather than retroactive in their effect, has been considered in several cases by the Supreme Court in recent years. The one upon which appellant primarily relies is *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). There the court remarked that a threshold requirement for depriving a decision of retroactive effect is that such decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* at 106 (citations omitted).

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[5]The *Ryan* opinion, reserved the right of this court sitting en banc, to refuse to follow such decisions. *Ryan, supra,* 285 A.2d at 312. Another well recognized exception to this principle of deference appeals to this principle of deference applied to pre-1971, decisions deiscredited by later holding of the Supreme Court, *e.g. Capitol, e.g., Capital Holding Corp. v. District of Columbia, 374 A.2d 573 (D.C. 1977).*

That factor alone is not conclusive for the court also stressed that inquiry should be made into the history and the purpose of the new rule of decision and "whether retrospective operation will further or retard its operation,' " *id.* at 106-07 (quoting *Linkletter v. Walker,* 381 U.S. 618, 629 (1965)), and whether inequity would result from retroactivity.

The plaintiff in *Chevron* was injured while working on an offshore drilling rig close to the Lousiana coast, but did not file suit against Chevron until two years after the accident.[6] During pretrial discovery, the Supreme Court published *Rodriguez v. Aetna Casualty & Surety Co.,* 395 U.S. 352 (1969), in which overruling a long line of federal decisions, it held that under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (1982), state law, rather than admiralty law, is applicable to actions based on personal injuries occurring on offshore structures. On the authority of that holding, the federal district court where the action was pending then held that Louisiana's one-year statute of limitations barred respondent's suit, but was reversed by the Court of Appeals for the Fifth Circuit.

In agreeing that *Rodriguez* should not have been applied retroactively, the Supreme Court emphasized that in addition to being a case of first impression in that court, *Rodriguez* overruled decisions clearly establishing "that admiralty law, including the doctgrine of laches, applies through the Lands Act." *Chevron, supra,* 404 U.S. at 107 (citations omitted). Hence, it could not "be assumed that

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[6]The *Chevron* case did not involve the Longshore Act, for the injured worker apparently elected to sue his employer directly insted of claiming workmen's compensation.

. . . [plaintiff] did or could foresee that this consistent interpretation of the Lands Act would be overturned." His reliance on the old law, therefore, was well-founded and consequently the dismissal of his action for untimeliness "on the basis of superseding legal doctrine . . . quite unforeseeable" was reversible error. *Id.* at 108.

In a subsequent opinion, *United States v. Johnson*, 457 U.S. 537 (1982), the Supreme Court undertook an extended review and analysis of the factors justifying the nonretroactive application of judicial opinions. It concluded that when the court has declared a rule of criminal procedure to be "a clear) break with the past," it has almost invariably found "such a 'newly minted principle' nonretroactive." *Id.* at 549 (citation omitted). In a footnote which cited *Chevron, supra,* as an example, the court observed that in the context of a civil case, the "clear break principle"; has unusually been stated as the threshold test. *Johnson, supra,* 457 U.S. at 550 n.12. We drew heavily upon these observations in *Brodis v. United States*, 468 A.2d 1335, 1337 (D.C. 1983), in refusing to set aside a conviction in a case tried prior to a novel holding of this court overruling a longstanding procedural practice.

Accordingly, the issue before us turns on the question of whether the construction of Section 33(b) by the Supreme Court in the *Rodriguez* case represented a "clear break with the past." In our opinion, it did not, for the rule of decision in *Wynn* at the time appellant's action was filed here had been undermined by intervening legislation in Congress. In the *Wynn* opinion, the court pointed out not merely the potential of conflicting interests in cases like *Czaplicki,* where there was a common insurer, but to another decision discouraging employers from suing third-party tortfeasors, *viz., Ryan Stevedoring Co. v. Pan-*

Atlantic Steamship Corp., 350 U.S. 124 (1956). There is was held that a shipowner liable for injuries to a longshoreman could recover over against the employer-stevedore for breach of the latter's implied duties of safety. Plainly this prospect of double liability would deter any assignee from suing to recover the compensation paid to the disabled employee.

Congress remedied this defect in the Act in 1972 by adopting an amendment to Section 5(b), 33 U.S.C. § 905(b), which eliminated a third party's right of indemnification from the primary employer thereby repudiating the *Ryan* doctrine. The United States Court of Appeals for the Second Circuit noted these latter changes in the Act in specificallay declining to follow the *Wynn* holding. *Rodriguez v. Compass Shipping Co., supra,* 617 F.2d at 955, 961. Moreover, even before the 1972 amendment, the only other circuit court called upon to interpret Section 33(b) expressed the view that an evidentiary showing of a conflict of interest between employee and employer-assignee was necessary to enable workers to maintain actions filed after the six-month deadline. *McClendon v. Charente Steamship Co.*, 348 F.2d 298 (5th Cir. 1965).

Since the 1972 amendments, the bar of this jurisdiction has manifested no reliance upon the *Wynn* holding.[7] In supporting plaintiffs who began actions against third persons more than six months after accepting compensation, their counsel have successfully argued that the six-month period does not start to run until a formal award is made — a point quite unnecessary to make if *Wynn* was still

[7]In *Mendes v. Johnson,* 389 A.2d 781 (D.C. 1978) (en banc), we stated that a relevant factor with respect to the application of a new rule of decision was the extent of the reliance of the parties on the old rule.

controlling law. *See Carey v. Crane Service Co.*, 457 A.2d 1102 (D.C. 1983); *Collier v. John Mendis, Inc.*, 526 F.Supp. 459 (D.D.C. 1981); *Fearson v. Johns-Manville Sales Corp.*, 525 F. Supp. 671 (D.D.C. 1981). It is also significant that in the case before us, it is not contended that the individual claimant (appellant here) placed any reliance upon the *Wynn* decision – or indeed was even aware of it – when he permitted more than six months to go by before bringing suit against appellee.

It is our opinion that *Rodriguez* was typical of numerous holdings of the Supreme Court, resolving conflicts of decision among different circuit courts of appeals on the interpretation of a specified statute. The impact of such resolutions by the highest court does not affect the rights of parties who have entered into settlements or accepted as final unappealed judgments of lower courts based on the authority of the rule of decision ultimately disapproved, but they become controlling authority for the disposition of pending cases.[8] As the Supreme Court observed in a context obviously applicable to appellant's thesis that the court below should have treated *Wynn* as controlling precedent, "[d]eviant rulings by circuit courts of appeals . . . cannot generally provide the "justified reliance' necessary to warrant withholding retroactive ap-

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[8]The same court which as handed down the *Wynn* opinion, concluded after *Rodriguez* that the 1959 and 1972 amendments had undercut even the basis for the *Czaplicki exception to Section 33(b). Accordingly, it dismissed a pending action, saying that the statute "no longer permits an employee to institute a third party action after the six month statutory window" citing with approval our memorandum opinion in Westbrook v. Hutchinson Crane Excavating Co.*, No. 82-1151 (D.C. June 30, 1983). *See Johnson v. Bechtel Associates*, 230 U.S. App. D.C. 297, 309, 717 F.2d 574 (1983) *reversed on other grounds, sub nom., Jonson v. WMATA, INFRA.*, N.9.

plication of a decision consstruing a statute as Congress intended it." *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970).

After this appeal was first argued, appellant moved for reargument, calling our attention to a new statute enacted by Congress while this case was *sub judicie, viz.*, the Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, approved September 28, 1984 (refferred to herein as "1984 Act"). He contended that one of the amendments in that statute overruled the Supreme Court's decision in *Rodriguez v. Compass Shipping Co., supra,* and thus deprived our own decisions in *Dodson* and in *Milligan, supra,* of precedential significance. This particular amendment, revising Section 33(b) of the Longshore Act, provides that if the employer to whom the worker's right to sue a third-party tortfeasor has been assigned (after the running of the six-month period) fails to exercise such right within ninety days after assignment, such right reverts to the worker. Such amendment – as appellant correctly pointed out – was one of those provisions in the new act which [Section 28(a)] "apply both with respect to claims filed after such [enactment] date and to claims pending on such date." Accordingly, appellant argues that although he might have lost his right to sue a third party under the old act, such right has now reverted to him, because his employer (or subrogee) allowed ninety days to elapse without commencing any action.

In order to examine the possible impact of the 1984 Act upon this case and other pending litigation in the District, we granted appellant's motion for reargument in an order also allowing a motion by the Washington Metropolitan Transit Authority (WMATA) to file an amicus brief and to participate in the argument.

If appellant's construction of the new statute is correct it would mean that a large number of employers whose assigned rights against third parties had already vested 90 days or more before the effective date of the new act, but who had not yet exercised them, would be deprived retroactively of ever being able to do so. If this was indeed the purpose of the statute, there would be serious questions about its constitutional validity.

Appellees, noting that the 1984 amendments to Section 33 also do away with priority of the employer's lien on the proceeds of a judgment against third parties, argue that the recent enactment conflicts with the Constitution, unless the words "claims pending" can be construed as limited to unadjudicated agency claims in contradistinction to actions at law pending in the courts.[9] But appellant contends that the provision he relies upon is more analogous to amendments affecting statutes of limitations, in which the doctrine of "relation back" has been successfully invoked, citing several authorities including *New York Central & Hudson R.R. v. Kenney*, 260 U.S. 340, 346 (1922).

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[9]The actual wording of the statute seems to sustain such a limited construction, for other sections which regulate the prosec ution of "claims" plainly refer to agency proceedings. But the correctness of such statutory interpretteion is clouded by language in the report of the joint conference managers with respect to other amendments, set forth in Section 4 of the 1984 Act which revised two provisions of the Longshore statute for the purpose of depriving *WMATA v. Johnson*, 104 S.Ct. 2827 (1984) of "precedential effect." Jt. Rep. of Conference managers, Daily Cong. Record H.R. 9593; Sept. 14, 1984. In explaining these amendments, the conference report also stated – presumably with regard to the intent of Section 28(a):

> The Conference substitute also provides a special effective date so that these amendments apply to pending suits. This will avoid the dismissal under WMATA of third party suits which were pending or on appeal on the date of the enactment.

We need not deal with such constitutional issues, however, for the crucial question here is whether the 1984 amendments to the Longshore Act have any relevance to this case. Appellant's injury did not occur in maritime employment. His right to compensation and to subsequent actions for damages consequently derives entirely from the District of Clumbia Workers' Compensation Act of 1928, D.C. Code §§ 36-501-502 (1973 ed.)[10] This Congressional statute in turn did make the provisions of what was then called the Longshoremen's and Harbor Workers' Compensation Act of 1927, including future amendments thereto, applicable to the injury or death of employees of persons carrying on private employment in the District,[11] But the 1928 act – one of purely local application – was expressly repealed by an act passed by the District Council in 1980, effective July 24, 1982.[12] Hence, appellees contend that amendments by Congress to the Longshore Act passed after the effective date of the repealer, have no bearing

[10]Act of May 17, 1928; 45 Stat. 600, ch. 612 § 1, D.C. Code § 36-501 (1973 ed).

[11]Despite this incorporation by reference, it was recognized that the two statutes were separate and distinct, the authority of Congress to enact each piece of legislation resting upon powers granted by different clauses in the Constitution *Gudmundson v. Cardillo*, 75 U.S. App. D.C. 230, 126 F.2d 52 (1942). The court noted that Congressional power to legislate with respect to longshoremen and other harbor workers rested on concept of admirality jurisdiction over navigable waters (the 1927 act); and upon the clause granting Congress legislative authority over the territorial "seat of government" to deal with injuries in every type of work in the District of Columbia (the 1928 act).

[12]27 D.C. Reg. 2503, 2541. Section 46 provides:

> An act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes, approved May 18, 1928 (45 Stat. 600; D.C. Code sec. 36-501-503) is hereby repealed.

whatsoever in the rights of litigants, like appellant, who were awarded workers' compensation because of injuries incurred in land based occupations in the District of Columbia. We agree.

Such repealer was merely one provision included in a comprehensive statute which replaced the District of Columbia Workers' Compensation Law of 1928 with a new method for compensating workers disabled in private employment in the District. D.C. Code §§ 36-301 to -344 (1981); D.C. Law 3-77, July 1, 1980, 27 DCR 2503. In adopting the new act the Council divorced the local workers' compensation system entirely from the Longshore Act of 1927. It provided that claims should be filed with and adjudicated by the municipal government instead of by a Federal agency and set a scale of compensation for different kinds of disabilities substantially below the corresponding levels in the Longshore Act — conforming more closely to the schedules established by state compensation laws in such neighboring jurisdictions as Maryland and Virginia.[13]

Shortly after its passage, the enforcement of the new statute was enjoined by an order of the Superior Court in a suit brought by labor organizations. It was not until 1982 that such order was reversed by a decision of this court holding that the Council had not exceeded its legislative

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[13]At legislative hearings, the local business community made a showing that convinced the Council that construction companies, mercantile enterprises, and service industries doing business in the District were unfairly burdened by ever increasing insurance premiums charged by carriers to cover employers subject to disproportionately greater liability under the Longshore Act than under comparable state laws.

authority under the District of Columbia Self-Government Act of 1973, D.C. Code §§ 1-102 to -295 (1981).[14]

Because of the injunction, claims filed during the pendency of this litigation continued to be processed by the United States Department of Labor and governed by the old act. When the validity of the new statute was upheld, the Council by legislative resolution postponed its effective date to July 24, 1982. We subsequently held that a worker injured before this date had no rights under the new act, as such an injury was then still covered by the 1928 Act, and compensability depended on its provisions. *Garrett v. Washington Air Compressor Co.*, 466 A.2d 462 (D.C. 1983).

Appellant, pointing out that his injury also occurred before the effective date of the new act and was therefore covered by the 1928 act, incorporating the Longshore Act "including all amendments that may hereafter be made thereto,"[15] argues that he is therefore entitled to invoke the Longshore Amendments of 1984 with respect to the time limitations in law suits authorized by Section 33(b), notwithstanding the repeal of the 1928 act. In our opinion this argument flies in the face of a savings statute enacted by Congress to deal with the legal effect to be accorded a repealed statute. It provides in pertinent part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute . . . and such statute shall be treated as still remaining in force *for the purpose of sustaining any proper*

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[14]*District of Columbia v. Greater Washington Central Labor Council AFL-CIO*, 442 A.2d 110 (D.C.), *rehearing denied*, 445 A.2d 960 (D.C. 1982), *cert. denied*, 460 U.S. 1016 (1983).

[15]Act of May 17, 1928 n.10, *supra*.

> *action* or prosecution for the enforcement of such penalty, forfeiture or liability.

1 U.S.C. 109 (1982) (emphasis added).[16]

Accordingly, so far as appellant was concerned, despite the repeal of the 1928 act, his rights of action against third party tortfeasors were still preserved by the provisions of that statute. But this certainly does not mean that the liitations such statute had imposed on such rights were removed by subsequent Congressional amendments to another act.

As a result of the Council action repealing the District of Columbia 1928 Act, that act had ceased to exist by 1984, when Congress amended the Longshore Act. Had it not been for the repealer, the 1928 act would indeed have incorporated those amendments, including the revisions of Section 33 which would have benefited appellant's cause. But as the 1928 act was no longer on the books, what Congress subsequently did to the Longshore statute did not affect any rights created by such prior law.

Our conclusion on this issue is identical to that reached by three different federal trial judges in this jurisdiction, presiding over cases in which persons suing under the District of Columbia Act of 1928 contended that their rights had been enlarged because of the 1984 Congressional amemdmentts to the Longshore Act. In each instance, these judges held that such amendments had no impact upon the workers' compensation laws governing the District.

The leading case, entitled *In re Metro Subway Accident Referral,* Misc. No. 82-306, slip op. (D.D.C. Dec. 18,

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[16] 1 U.S.C. 109 is a general act of Congress applicable to the District of Columbia. D.C. Code § 49-301.

1984),[17] was an opinion and order of Judge Pratt dismissing approximately 90 lawsuits filed against the Transit Authority, decisions which had been stayed because of the pendency of appeals ultimately resolved by *WMATA v. Johnson, supra note* 9, 104 S. Ct. at 2836. Plaintiffs in these suits – for the most part tunnel workers employed by construction subscontractors – having incurred occupational disability filed claims for compensation against their immediate employers under the District of Columbia 1928 Act. The resulting compensation awards were paid by an insurance carrier from whom WMATA itself – the general contractor – had purchased a "wrap-up" policy covering all the numerous subcontractors on the subway project against potential liability for injuries to the workers they hired. This precautionary step relived such subcontractor of the necessity of taking out insurance on their own account.

Claimants filed tort actions against WMATA alleging that the Authority was negligent in permitting them to work under conditions likely to cause respiratory injuries.

Under Section 4(a) of the Longshore Act (then incorporated in the 1928 District of Columbia Act), which requires every employer to secure payment to his employees for payment compensable under the act, a contractor is under an obligation to secure payments to employees of his subcontractors unless the subcontractor has secured such payments. Section 5(a) of the act grants immunity to employers who have complied with the preceding section against additional liability.

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[17]Cited with approval and followed in *Stokes v. Hyman Construction Co.*, C.A. No. 84-1418, slip op. (D.D.C. Jan. 18, 1985) (Parker, J.); and in *Lewhew v. AFGO Engineering Corp.*, C.A. No. 81-1593, slip op. (D.D.C. Feb. 27, 1985) (Gasch, J.)

The theory of the plaintiffs was that since their own employers – the subcontractors – had not been in default of their obligation to secure payments (*i.e.*, to carry liability insurance), WMATA was sueable as a third party tortfeasor and could not claim immunity as an "employer." In the *Johnson* case, *supra,* the Supreme Court rejected this view in an opinion handed down June 26, 1984 – just before its summer recess. Soon thereafter, the United States District Court issued a rule to show cause as to why these actions and other pending actions against WMATA by plaintifs in similar situations should not be dismissed.

In the interim, because of differences between the bills passed by the Senate and House on the Longshore Act Amendments, the measure had been referred to a joint conference committee. Although there was nothing in the versions of the legislation approved by either body dealing with the issue considered in the *Johnson* case, the conferees inserted a new provision in the conference substitute which amended Section 5(a) of the Longshore Act, so as to make it clear that a general contractor who took out worker's compensation insurance for his subcontractor's employees did not gain immunity as an "employer," unless such action was triggered by an actual failure of a subcontractor to comply with his statutory duty to "secure" compensation. This meant that general contractors who had followed the course of action taken by *WMATA* were no longer immune from liability in suits brought by employees of subcontractors, for the conference report, in explaining such amendment, expressly disapproved of the Supreme Court holding in the *Johnson* case, *supra,* and noted that in law suits still pending or on appeal, such holding should not be accorded "precedential effect" –

an apparent reference to Section 28(a) of the 1984 Act mentioned earlier in this opinion.[18]

The conference substitute was passed by both branches of Congress withoiut floor debate – the motion to adopt in the Senate following brief explanations by three of the Senate conferees, none of whom alluded to the Sectdion 5(a) amendment or indeed to any possible bearing of the bill upon District of Columbia law.[19] The President approved the enrolled bill on September 27,a 1984, releasing a short explanatory statement.

Thus, later in the same year in passing upon the proposition of the plaintiff to dismissal in *Metro Subway, supra,* Judge Pratt was squarely confronted, as we have been in the appeal now before us, with the question of whether or not the 1984 amendments to the Longshore Act affected pending actdions filed under the local act of 1928. In a well-reasoned opinion, he decided that as a result of the repealer to which we have adverted, the recent Congressional legislation did not affecdt such actions, being directed solely at the various kinds of maritime employment covered by the federal act of 1927 as amended. Accordingly, deeming *WMATA v. Johnson, supra,* 104 S. Ct. at 2827, still controlling with respect to the cases in the District Court, he dismissed them, although he did remark that the joint statement of the conferees is "somewhat ambiguous as to whether Congress was thinking of the Johnson litigation or the principle embodied in the *Johnson* decision." *In re Metro Subway Accident Referral, supra,* slip op. at 7 n.11.

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[18]Joint Explanatory Statement of the Committee of Conference, Cong. Reg. H. 9598, September 1984.

[19]*See* Cong. Rec. S. 11621 to 11627, September 20, 1984.

In our view, Judge Pratt, in the absence of any wording in the new act referring to workers' compensation in the District, was fully justified in concluding that it was only the "principle" or rule of decision in *Johnson,* that had been overruled. There are numerous operations covered by the Longshore Act, *e.g.,* dry-dock overhaul of vessels, off-shore oil rights, shipbuilding, etc., which require the services of literally scores of subcontractors. Obviously the unions representing workers on such projects – and credited in the reports of the House and Senate Committees as helping to shape the new legislation[20] would scarcely regard favorably any legal doctrine having ominous overtones with respect to successful litigation against general contractors in maritime industries.

Appellant has assailed the conclusion reached in *Metro Subway* on several grounds, none of which are persuasive. He argues that because the 1984 act specifically makes certain provisions inapplicable or limited with regard to the Black Lung Act and the Outer Continental Shelf Act – statutes also incorporating by reference portions of the Longshore Act – the absence of any similar reference to the 1982 District of Columbia Act indicates that Congress intended that its amendments were also applicable to the latter. The short answer to this contention is that there was no occasion for Congress to exclude expressly from the application of provisions of the new law any statute already repealed. Congress was certainly aware of the repeal of the 1928 act, for the Council legislation accomplishing such action had been submitted to Congressional review for the statutory period of 30 legislative days, and became law without the disapproval of either branch.[21]

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[20] *See* H.R. Rep. No. 98-579, 98th Cong., p. 2; S. Rep. No. 98-81, *id.* p. 23.

[21] *See* D.C. Code § 36-345 (Supp. 1984).

Nor are we impressed by the argument that the Department of Labor, the federal agency entrusted with the administration of the Longshore Act, has indicated that the 1984 amendments are applicble to employees injured in the District of Columbia before the new local act became effective.[22] Appellant suggests that we should defer to this administrative construction. Such rule of deference with respect to administrative "expertise" is sometimes mentioned by the courts in sustainilng an agency rule or adjudication, but is never employed with respect to statutory provisions limiting the time or scope of judicial review or the institution of lawsuits, as provisions dealing with the jurisdiction of the court are not within the province of an agency to itnerpret.

An examinatioin of the 1984 act and its legislative history persuades us that Congress, in revising the Longshore statute, focused attention entirely upon difficulties encountered by maritime employers and employes under its then existing provisions. One of its major concerns was the broad scope of coverage which had resulted in overlapping claims under federal and state law. It solved this problem by erxcluding several categories of workers previously within the act, *e.g.*, employees of yachting marinas, shoreside museums and restaurants, builders of small boats, etc., leaving such persons to the coverage of state workmen's compensation laws.[23]

If a central purpose of the 1984 legislation was to remove from coverage substantial numbers of employes

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[22]Appellant relies upon published rules for adjudication promulgated by what was apparently a lower level of the department. With commendable candor, counsel for appellant informed us after oral argument that he had been mistaken in stating that the Solicitor of Labor had issued an opinion agreeing with his positioin.

[23]Jt., Conf. Rep., *supra*, Cong. Rec. II ⅝592-93, Sept. 14, 1984.

whose connection with maritime industries was too peripheral, it would be passing strange to infer that Congress meant the new act to cover persons injured in purely land based occupations. Plainly the President of the United States understood that the 1984 act affected only the maritime industry, for in giving it his approval, he stated in part:[24]

> I have today signed S. 38, the "Longshore and Harbor Workers' Compensation Act Amendments of 1984." The last amendments to this Act in 1972 expanded worker coverage and provided relatively high benefits which resulted in excessive costs. Today's legislation addresses these issues and makes important reforms in workers' compensation for injured workers, who contributed so much to our NMation's *vital maritime industry,* and their families. . . .
>
> I want to congratulate all the parties to this consensus legislation. Their efforts strike a balance between continuing to provide fair and necessary benefits for injured workers and their families and, at the same time, giving employers, insurers and the Labor Department the means to control program costs more effectively. The bill will accomplish this by clarifying the Act's coverage to exempt certain categories of workers whose work activities are *on land,* putting reasonable limits on benefits, and increasing the penalties for fraud and abuse. (Emphasis supplied).

Affirmed.

---

[24] *See Statement by the President, released by White House, September 28, 1984.*

APPENDIX D

In the
Superior Court for the District of Columbia
January 8, 1986
CA No. 14192-79

JOHN D. O'CONNELL
Plaintiff

vs.

MARYLAND STEEL ERECTORS, INC.
Defendant and Third Party Plaintiff

vs.

STEELE AND MORONEY, INC.
Third Party Defendant

ORDER

This matter having come before the Court for trial and the court thereupon having entrtained a Motion to Dismiss for lack of jurisdiction and the court having reviewed the memoranda on the subject submitted by the plaintiff and defendant pursuant to the Pretrial Order, and the court having heard oral argument from all parties it is by the court this 8th day of January 1982. [*nun pro tunc*] 16th day of December, 1981

ORDERED that the Complaint herein be and the same is hereby dismissed for failure of the plaintiff to file the suit within six months of accepting workmen's compensation pursuant to a formal award as required by U.S.C.A. 33 § 933b and it is further

ORDERED that the third party complaint herein is dismissed without prejudice, as moot.

HONORABLE SYLVIA BACON

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Wheaton, Maryland 20902

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Supreme Court, U.S.
FILED
MAR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1216

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

JOHN D. O'CONNELL,
Petitioner,

v.

MARYLAND STEEL ERECTORS, INC., *et al.*,
Respondent.

REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1216

JOHN D. O'CONNELL,

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v.

MARYLAND STEEL ERECTORS, INC., *et al.*,

Respondent.

REPLY BRIEF

In their Opposition to the Petition for a Writ of Certiorari, the respondents materially mischaracterize the question as being one of a statute of limitations. It is nothing of the sort, as the action herein was brought within the applicable period of limitations.

The substantive issue here is whether the Longshore Amendments of 1984, Pub. L. 98-426, 98 Stat. 1639 (1984), which adjust the rights of the employers and employees subject to the Act, are applicable also to the injuries governed by the District of Columbia extension of the Longshoremen's and Harbor Workers' Compensation Act. This disingenuous presentation of the issue as one involving the statute of limitations is made solely to disincline the Court to review the very significant and far-

reaching effects of the decision below. As will be demonstrated, the decision below is not only profoundly in error, but it also aids tortfeasors at the expense of employers and employees, whose rights against third-party tortfeasors were intended by Congress to be preserved.

I.

THE DECISION BELOW HAS BEEN SOUNDLY REJECTED BY AN UNPRECEDENTED AND EXTRAORDINARY COMMENT ENUNCIATED BY THE UNITED STATES DEPARTMENT OF LABOR, AND WILL NOT BE FOLLOWED IN COMPENSATION CLAIMS GOVERNED BY THE 1928 ACT

Contrary to the arguments of the respondents, the issues involved herein are of tremendous consequence. The court below which has no statutory authority whatsoever to hear cases governed by the federal act, has in effect held that the federal agencies and courts administering the 1928 Act are not to apply the current version of the applicable law. The United States Department of Labor, which administers the 1928 Act, has now formally declined to follow the decision of the court below. The thousands of cases still governed by the 1928 Act will be subject to the current version of the LHWCA, and the decision of the District of Columbia Court of Appeals in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985) will not be followed. 20 C.F.R. § 701.101(b) (Feb. 3, 1986). In its comment rejecting the rationale of the court below, the Department explained the importance of the issue involved herein and the error of the court below:[1] The most critical portions of the regulations are contained in the addendum to the brief. The

[1]It is interesting to note that one of the *dissenting* justices below in the Petition for Rehearing En Banc, Associate Judge Rogers, had first hand knowledge concerning D.C. Council's purpose in enacting the D.C. Workmen's Compensation Act of 1979, D.C. Code § 36-301 *et seq.* (1982). Judge Rogers was at the time employed in the Office of the D.C. Corporation Counsel. She was the Corporation Counsel for the District of Columbia from 1979 to 1983.

regulations were published in their entirety in the Federal Register, Vol. 51, No. 22, Feb. 3, 1986, 4270-4273.

This extraordinary comment serves to underscore the importance of the issues involved in this case.[2]

This Court has held on numerous occasions that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that this is wrong. . . ." *Red Lion Broadcasting Company v. FCC*, 395 U.S. 367, 381 (1969); *New York Department of Employment Services v. Dublino*, 413 U.S. 405, 421 (1973); *Miller v. Youakim*, 440 U.S. 125, 144 (1979).

While this principle is most often applied when the courts are presented with questions concerning proper interpretation of a statutory provision within the agency's expertise, it has been applied in other contexts as well. In *Dublino*, for instance, this Court deferred to the United States Department of Labor's administrative conclusion that the Federal Work Incentive Program does not pre-empt state work programs. The legal issue presented in *Dublino* did not involve interpretation of a statutory term, but rather a broad question of law such as that presented here.

While the proper interpretation of the savings statute is a federal question which this Court must in the last analysis decide, certainly the United States Department of Labor's conclusion that the 1984 Amendments apply in the District is entitled to significant consideration and deference. The Department of Labor continues, even after the adoption of the New D.C. Act, to be the agency charged with administration of District claims brought pursuant to the Longshore Act. As such, it is

[2]The Department of Labor is unquestionably within its rights to decline to follow the decision of the court below. The judicial chain of command for the 1928 Act is federal rather than local. In fact, the court below, which declined to stay the case pending the decision of the federal circuit court, and instead ordered *expedited* arguments, abused its discretion in not recognizing the issue as one of uniquely federal law.

uniquely qualified to assess the chaos and unfairness that would occur were it forced to administer two entirely different versions of the Longshore Act. Because the savings statute was designed to apply in a very different context than that involved here, its rational interpretation for purposes of this case necessarily involves a consideration of the practical effects that the D.C. City Council and Congress could have anticipated when the New Act was allowed to become law and when the 1984 Lognshore Amendments were passed. Given the Department of Labor's unique ability to assess the effects of a holding that District claimants and employers are bound by, a legislatively discarded version of the Longshore Act, it is also in the best position to determine whether the absurd and anomalous effects of such an interpretation could possibly have been intended by the D.C. City Council or Congress. Therefore, this Court should defer to its logical and sensible interpretation of the savings statute and its assessment of the intent of the D.C. City Council and Congress.

Finally, the Department of Labor's conclusion that the 1984 Amendments are applicable in the District should be given substantial consideration because the Department of Labor is not an interested party, and because it reached its conclusion not only having had the opportunity to fully analyze the decision below in this case and the *O'Connell* decision, but also after a full consideration of all comments, including those presented by WMATA, on the interim regulations issued in January, 1985. 51 Fed. Reg. 4270, 4271.

II.

THE DEPARTMENT OF LABOR'S ANALYSIS OF THE ISSUE IS CORRECT, AND SHOULD BE ADOPTED BY THE COURT

Totally apart from the deference that should be given the Department of Labor's conclusion that the 1984 Amendments are applicable in the District, this Court should consider the analysis and arguments presented in the regulations on their merits, just as it would had the Department of Labor filed an *amicus* brief in this case. We believe that the clear and cogent explanation given for the Department of Labor's conclusion will add significantly to the Court's understanding of the issues, and will assist the Court in reaching its decision in this case.

While we do not propose to discuss the Department of Labor's (DOL) analysis in detail, we do believe that a brief summary of the primary points made, with specific reference to similar arguments made in our briefs, is appropriate. We enumerate these points below.

1. DOL points out that the local government and DOL have always been in agreement that the New D.C. Act was not intended to affect the operation of the Longshore Act with regard to pre-July 26, 1982 cases, that the District passed regulations to this effect, and that no one, prior to this litigation, challenged the proposition that the 1928 Act was *fully viable* for the class of cases it governs. 51 Fed. Reg. 4271. We make this point in Appellants' Brief at 14-18, 21-23 and our Reply Brief at 10-15.

2. DOL points out that a holding that the savings statute preserves only liabilities *accrued* at the time of the repeal would not explain a claimant's undisputed right to future benefits. DOL reasons, consistent with the language used in the savings statute, that it preserves all "*incurred*" liabilities, whether or not such liabilities are "*accrued*" or contingent, and that all liabilities, including those based on future amendments, are incurred as of the date of injury. Since the savings statute provides that a saved statute is to be treated as "still . . . . in force" for purpose of *all*

"incurred" liabilities, the clause of the 1928 Act providing that all subsequent amendments are applicable in the District operates to assure the applicability of the 1984 Longshore Amendments in the District. 51 Fed. Reg. at 4272. We make the identical point in Appellants' Brief at 23-28 and our Reply Brief at 16-18.

3. DOL also points out that the *O'Connell* Court erred in assuming that Congress intended the amendments to apply only in the maritime context. 51 Fed. Reg. at 4272. We make this point in Appellants Brief at 11-13, 18-21 and our Reply Brief at 6-9.

In summary, we believe that the Department of Labor's substantive arguments, while similar in many respects to arguments also presented by the appellants, are particularly well-expressed, and that the Court should therefore give these arguments substantial consideration.

III.

THE AMENDMENTS TO 33 U.S.C. § 933(b) ARE INTENDED TO DEPRIVE THESE TORTFEASORS FROM UTILIZING *RODRIGUEZ V. COMPASS SHIPPING COMPANY* AS A DEFENSE TO DEFEAT THE RIGHTS OF THE INJURED EMPLOYEE AND HIS EMPLOYER

At the time this civil action for negligence was filed in 1979, the undisputed law in the District of Columbia was *Potomac Electric Power Co. v. Wynn,* 120 U.S. App. D.C. 13, 343 F.2d 195 (D.C. 1965). Under that case, this action was properly brought and petitioner had standing to sue. Unquestionably the employer and its carrier had a statutory lien for benefits paid, and both employer and employee were protected under this arrangement. In 1981, this Court, in *Rodriguez v. Compass Shipping Co.,* 451 U.S. 596 (1981) overuled *Wynn* and held that the provisions of 33 U.S.C. § 933(b) must be strictly observed, and gave tortfeasors the opportunity to question the standing of injured workers to bring suit any time suit is brought after six

months following the receipt of benefits pursuant to a formal award of benefits. Unfortunately, *Rodriguez* has in practice wreaked havoc on employees and employers, while benefiting only third-party tortfeasors who have characterized the § 933(b) provision as being a "statute of limitations." The 1984 Amendments seek to rectify this unfortunate state of affairs, which have provided an unwanted boon for the wrongdoers which have caused injuries.

The new amendments simply return the *right* to bring a third-party action to the injured worker 90 days after entry of a formal award, or the effective date of the amendments, whichever is earlier. In this case, the cause of action became the property of the petitioner on December 28, 1984, while the matter was still *sub judice*. Since the case was pending, the intent of Congress should be effected, and the case should be remanded for trial. Only in that way can both the interests of the employee and employer be protected and the illegitimate purpose of the respondent tortfeasor be prevented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the District of Columbia Court of Appeals be granted.

Respectfully submitted,

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DEPARTMENT OF LABOR
Employment Standards Administration
20 CFR Parts 701, 702 and 703
***

Scope of this Subchapter

The Interim Final Rules, at § 701.101, stated that these regulations (and by reference the 1984 Amendments) apply to the Longshore and Harbor Workers' Compensation Act (LHWCA) and its direct extensions, including the District of Columbia Workmen's Compensation Act of 1928 (DCCA, or the 1928 Act).

Several affected parties submitted comments asserting that the 1984 Amendments should have no application to cases that arose under the 1928 Act, which was "repealed" by the District of Columbia City Council in its own District of Columbia Workers' Compensation Act that became effective July 26, 1982 (the 1982 Act). Further, some courts considering the question in the context of the 1984 Amendments' changes in the incidents of injured workers' tort rights have found the 1984 Amendments inapplicable to cases arising under the repealed 1928 Act. The subject is of immediate concern in continuing litigation and administration of many cases arising out of pre-1982 employment injuries. The Department has determined that all concerned parties and tribunals could benefit from a further statement of the Department's construction of the interrelationship between the 1928 Act, the 1982 Act, and the 1984 Amendments. These final rules state that construction: that the 1928 Act is to be treated as still in effect, for all purposes (including application of the current version of the LHWCA according to its terms), in cases in which the employment event or events on which

the employment event or events on which the claim is predicated occurred before the new D.C. Act took effect.

Congress enacted the DCCA in 1928, in the exercise of its power to legislate generally for the District of Columbia. The DCCA provided simply that the Longshore and Harbor Workers' Compensation Act (LHWCA), enacted the previous year (44 Stat. 1424), "including all amendments that may hereafter be made thereto, shall apply" to private employment in the District. Pub. L. 419, 45 Stat. 600. In 1979, pursuant to authority conferred by Congress in the District of Columbia Self-Government and Governmental Reorganization Act of 1973, D.C. Code sections 1-102 to -295 (1981), the District of Columbia City Council and Mayor enacted the District of Columbia Workers' Compensation Act, the D.C. Law 3-77 (July 1, 1980), D.C. Code sections 36-301 to -344 (1981). After amendments extending its effective date, this act took effect on July 26, 1982. It contains no provision, other than that specifying its effective date, delimiting the class of cases to which it is applicable. It does contain a provision that the 1928 Act "is hereby repealed." *Id.* section 46, 27 D.C. Reg. 2503, 2541.

The local government and the United States Department of Labor, responsible for administration of the old law, were in full agreement that the new law did not disturb the operation of the old one with respect to pre-1982 cases, and the District of Columbia regulations promulgated under the new law limited its application to "injuries which occur on or after July 26, 1982." (Code of D.C. Reg. section 3602.1, 29 D.C. Reg. 5540 (Dec. 17, 1982)). No one then challenged the proposition that the 1928 Act was fully viable for purposes of applying the LHWCA to determine and enforce liabilities *continuing* to accrue for *post*-1982 medical services, disabilities, and survivorship related to

injuries arising out of employment before the new law took effect. Such continued applicability of the 1928 Act was assumed and stated without analysis by both the District of Columbia Court of Appeals (*Garrett v. Washington Air Compressor Co.*, 466 A.2d 464 n.1 (D.C. 1983); *Carey v. Crane Service Co.*, 457 A.2d 1102, 1102 n.2 (D.C. 1983)), and the federal Court of Appeals for the District of Columbia Circuit (*Crum v. General Adjustment Bureau*, 738 F.2d 474, 475 n.2 (D.C. Cir. 1984); *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 792 n.1 (D.C. Cir. 1984); *Stevenson v. Linens of the Week*, 688 F.2d 93, 95 n.1 (D.C. Cir. 1982)). Conversely, the local administrative authorities denied claims under the new law for post-1982 consequences of pre-1982 employment.

The LHWCA was amended on September 28, 1984. The Amendments have detailed effective-date provisions making many of their changes in the law applicable to future determinations of rights and liabilities based on *past* injuries and deaths, as well as those based on injuries occurring thereafter (*Id.* § 28, 98 Stat. 1655). The question whether these amendments to the LHWCA apply to liabilities under the 1928 Act has been presented in several contexts.

First, in *WMATA v. Johnson*, 104 S.Ct. 2827 (1984), the Supreme Court had interpreted sections 4(a), and 5(a) of the LHWCA as extending the tort immunity of an injured worker's employer to the "general contractor" to whom the immediate employer is a "subcontractor," under nearly all circumstances. Hence, the Washington Metropolitan Area Transit Authority (WMATA) was held immune to tort liability, based on its negligence, to injured employees of its subway-construction contractors. The cases that had been before the Supreme Court, many other pending tort suits against WMATA to which the *Johnson*

ruling applied, and still more suits against other "general contractors" similarly situated, were still pending (final judgments not yet having been entered) when the LHWCA Amendments of 1984 were enacted. The plaintiffs immediately relied upon the amendments to sections 4(a) and 5(a), which were expressly made applicable to pending cases as well as new ones (1984 Amendments section 28(a), 98 Stat. 1655) and were expressly intended to preclude any still-pending cases from dismissal on the basis of the *Johnson* decision. (Conference Report, H.R. Rep. No. 98-1027, at 24 (1984)). In cases arising under the LHWCA itself, this position was readily sustained, and dismissals under *WMATA* v. *Johnson* were reversed on the basis of the 1984 Amendments, *E.g., Louviere* v. *Marathon Oil Co.*, 755 F.2d 428 (5th Cir. 1985). In cases under the old DCCA, however, WMATA and other defendants asserted, inter alia, that the 1984 LHWCA Amendments could have no operation under the "repealed" 1928 Act. Although at least one judge of the U.S. District Court for the District of Columbia had apparently held that the *Johnson* decision was no longer the applicable law, *(Lehrer* v. *AFGO Engineering Corp., Civ.* No. 81-1593 (D.D.C. Oct. 10, 1984] (Gasch, J.) (unpublished order denying summary judgment for defendant), WMATA's position was accepted by Judge Pratt in *In re Metro Subway Accident Referral,* Misc. No. 82-306 (D.D.C. Dec. 18, 1984). The *Metro Subway* opinion "accept[ed] as a fact that the Congress in enacting the 1984 amendments intended the amendments to sections 4(a) and 5(a) of the [LHWCA] to apply to the District of Columbia and therefore to this litigation," but reasoned that "[t]he crucial question is not whether Congress possessed the power and had this intent, but whether the means it employed achieved this result." (*In re Metro Subway Accident Referral, supra,* Slip op. at 7). The court concluded that "[h]aving been repealed, the

1928 Act could not be affected by amendments to the [LHWCA]," and that the effect of the general saving statute, 1 U.S.C. 109, is only to "preserve . . . accrued rights and liabilities" that "exist[ed] at the time of the repeal." This decision has been appealed to the District of Columbia Circuit, which also has the issue before it in other indistinguishable cases.

The IFR, at § 701.101(b), provided that the new regulations (and, by implication, the amendments they embodied) would apply to old DCCA cases. This assertion has been challenged in comments on the interim final regulations, submitted on behalf of WMATA, in reliance on the *Metro Subway Accident Referral* opinion.

The applicability of the 1984 Amendments to old-DCCA cases was presented again in tort litigation in *O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134 (D.C. 1985). *O'Connell* involved the viability of an injured worker's tort suit against a negligent third party, where the suit was filed more than six months after entry of a formal award of compensation. Before the 1984 Amendments, LHWCA § 33(b) provided that, perhaps subject to rare exceptions based on conflicts of interest, the workers' right to sue was irrevocably assigned to the employer six months after an award; under the 1984 Amendments, the right reverts to the employee if the employer does not exercise it within 90 days. The court generally followed the reasoning of the *Metro Subway* decision in holding that because the injury was covered by the old DCCA rather than the LHWCA itself, the amendment was wholly inapplicable. It reasoned that because of its repeal in 1982 by the new DCCA, the old DCCA "had ceased to exist" and "was no longer on the books" before 1984, so that the Amendments "did not affect any rights created by [the] prior law." 495 A.2d at 1142. The court denied any deference to

the IFR at 701.101(b), on the ground that "provisions dealing with the jurisdiction of the courts are not within the province of an agency to interpret." *Id.* at 1144. And it determined that the 1984 Amendments were not "meant . . . to cover persons injured in purely land based occupations" and "affected only the maritime industry." *Id.*

Contrary to the reasoning *Metro Subway* and *O'Connell,* the proposition asserted in the IFR — that the LHWCA Amendments of 1984, insofar as they apply in terms to "pending claims," apply to such claims under the old DCCA — is both sound and, as a practical matter, strictly necessary. The "general saving statute," 1 U.S.C. 109, not only preserves "liabilit[ies] incurred" under a repealed statute, but further provides that for purposes of determining and enforcing such liabilities the repealed statutes "shall be treated as still remaining in force." Hence, as to the preserved claims and liabilities, the 1928 Act is "still . . . in force." The terms of the statute that is thus preserved for the relevant class of rights and liabilities (the 1928 Act) expressly make the LHWCA *as amended* applicable; and the LHWCA, as currently amended, includes provisions added in 1984 which are expressly applicable to claims arising out of employment before 1982 as much as to those arising after 1984.

The contrary view expressed in *In re Metro Subway Accident Referral, supra,* and *O'Connell, supra,* would appear to have consequences far beyond the inapplicability of the 1984 LHWCA Amendments to rights and liabilities under the 1928 Act. The statement that the saving statute preserves only "*accrued* rights and liabilities" existing at the time of the repeal," *In re Metro,* Slip op. at 10, would lead to legal and administrative chaos. The only rights and liabilities "accrued" under the 1928 Act as of July 26, 1982, were for medical services rendered by that date,

disability or survivor status continuing to that date, attorneys' services performed up to that date, and special fund assessments made up to that date. Thus, if only such "accrued" liabilities and rights were preserved for enforcement after that date, there would be no basis for the *continuing* accrual of rights and liabilities under the 1928 Act after its repeal, even in circumstances where the *employment events* on which the rights and liabilities are based occurred before then.

The Department of Labor, like all relevant judicial tribunals, the local District of Columbia administrators, and indeed all insurers and self-insurers responsible for payments up to now under the old DCCA, *have certainly assumed the contrary* — i.e., that what is preserved under the old DCCA is all rights and liabilities, whenever "accruing," arising out of *employment* events before July 26, 1982. The future liabilities resulting from those events, though contingent in duration and amount on future events (and hence neither "accrued" nor "vested"), were, in the language of the general saving statute, "incurred" by the employers or insurers at the time of the employment events. *O'Connell's* reasoning that the old DCCA "had ceased to exist" and "was no longer on the books" in 1984 is as inconsistent with the court's own application of the pre-1984 version of the LHWCA, through the 1928 Act, as it would be with application of the amended version. Pursuant to the general saving statute, the 1928 Act *remains in force* for all circumstances in which the employer's liabilities were "incurred" before its repeal, even if those liabilities had not yet accrued. The *O'Connell* court also erred in reasoning that Congress and the President intended the 1984 Amendments to apply only to maritime, not "purely land based," employment; even apart from the old DCCA, the Amendments certainly apply to entirely non-

maritime employment through the other statutory extensions of the LHWCA (see 20 CFR 701.101(a)).

Since the rights and liabilities preserved by the general saving statute included liabilities that were not "accrued" or "vested," but were *contingent* (even though already "incurred"), the application of new legislation readjusting some of those liabilities upwards and others downwards is entirely valid. It is clear that the District of Columbia government's intent and understanding when it enacted and implemented the 1982 Act was that the 1928 Act would remain fully in effect with respect to past *and future* liabilities deriving from pre-1982 employment events. It is equally clear that when Congress passed the 1984 LHWCA Amendments, it intended to readjust and to rebalance the rights and liabilities in *all* cases in which the LHWCA was the measure of those rights and liabilities.

In sum, the reasoning of the opinions in *In re Metro Subway Accident Referral* and *O'Connell* is unsound and would have extremely unfortunate consequences. The question should not be characterized as whether a repealed statute can be amended, but whether an incorporating statute which remains in effect as to a class of cases should apply the incorporated statute according to the latter's current terms. The 1928 Act remains in effect pursuant to the general saving statute, so as to apply the *current* version of the LHWCA (where its terms so provide), to determine liabilities resulting from employment events before July 26, 1982.

The IFR stated that the 1928 Act applies to "injuries or deaths sustained prior to July 26, 1982," when the new local legislation superseding the 1928 Act took effect. 20 CFR 701.101(b), 50 FR 391. This statement is substantially revised for clarity.

First, when an "injury [is] sustained" is ambiguous, and to the extent it is the appropriate standard it is defined differently for these purposes than for others. For example, if a worker whose leg was injured at work in 1980 falls while at home, because of the impaired leg, in 1984, that injury is "consequential" to the 1980 injury, and its consequences and sequellae are compensable based on their relationship to the earlier injury; yet the compensable consequential injury was "sustained" in 1984. It is not compensable under the new local legislation, and must reasonably be compensable under the old law. Further, the "injury" represented by an occupational disease is not considered for other purposers to "occur," or to be "sustained," until it causes symptoms; but for the purpose of determining whether a workers' compensation statute *applies* to such an injury ("coverage"), the relevant legal provisions are those in effect at the time of the *employment exposure* to the conditions that cause the disease. Finally, coverage of a *death* claim does not turn on when "death [is] sustained." The LHWCA itself, for example, until its shoreward extension in 1972, covered only employment afloat; it was never applied to cases of death *after* the 1972 amendments, related to employment events *before* 1972 in *shoreside* longshoring or shipyard work. See generally *Stark* v. *Bethlehem Steel Corp.*, 10 BRBS 350, 353-354 (1979); *Verderane* v. *Jacksonville Shipyards, Inc.*, 14 BRBS 220.15, 223-224 (1981); *id.* at 228 (concurrence); *id.* at 231 (dissent). Similarly, a death in 1985 resulting from a 1981 employment injury will not be within the coverage of the local DCCA that took effect in 1982, any more than an occupational disease becoming manifest in 1985, arising out of employment exposure before 1982.

Workers' compensation laws operate upon the employment relationship. The occurrence of an event or events in

the course of that relationship is the foundation of any compensation-law liabilities that arise thereafter. The insurance requirement that is a socially and practically critical aspect of compensation legislation attaches to the *conduct* of *covered employment*. The strictly standardized form of compensation insurance policy defines the liabilities covered by a policy for a specified term, as all those arising out of *employment* during the policy's term, regardless of when the liabilities arise. Hence a policy issued to a District of Columbia employer under the 1928 Act for the year 1981 will cover the employer's liability, *under the old law* (including any statutory amendments to that law that are applicable to the case), for a 1985 death related to *employment* in 1981; but the employer's 1985 insurance policy (if the employer is still in business), under the new law, will not include such liability.

Thus, highly unsettling consequences would follow if the distinction between 1928-Act and 1982-Act cases were different from the distinction between what is covered under old-DCCA insurance policies and what is covered on new-DCCA policies. Insurers would be relieved of liabilities they contracted to bear, and either some cases that would otherwise be compensable would not be or the liabilities in those cases, if under the 1982 Act, would be uninsured and would fall on the employers themselves even though they were continuously insured under one law or the other.

The courts that have included footnotes in their opinions explaining their continued application of the old DCCA in the case before them after its repeal have stated a variety of bases – that "events in this case occurred prior to the passage of" the 1982 Act, (*Carey* v. *Crane Service Co.*, 457 A.2d 1102, 1103 n.2 (D.C. 1983) (employee's tort suit)), or that "all of the pertinent events occurred

before [its] effective date," (*Garrett* v. *Washington Air Compressor Co.*, 466 A.2d 462, 462 n.1 (D.C. 1983) (same)), or that the "injury and claim occurred" before repeal, (*Stevenson* v. *Linens of the Week*, 688 F.2d 93, 95 n.1 (D.C. Cir. 1982) (review of old-DCCA award)) or that the "claim arose before the enactment" of the repeal, (*Crum* v. *General Adjustment Bureau*, 738 F.2d 474, 475 n.2 (D.C. Cir. 1984) (same)), or that "the claim was filed before the effective date" of the repeal. (*Carter* v. *Director, OWCP*, 751 F.2d 1398, 1399 n.1 (D.C. Cir. 1985) (same)). None of these statements was the result of consideration and resolution of a disagreement between the parties, nor would the different standard here promulgated have changed the results. It is appropriate to preserve the applicability of the 1928 Act for *all* liabilities arising out of *employment* before its repeal. The general saving statute, 1 U.S.C. 109, may be seen to support this analysis. It preserves any "liability incurred" under a statute before its repeal. The liability of an employer under a workers' compensation statute is "incurred" at the time of its conduct of the employment out of which a disabling injury arises, even though such liability may not even begin to *accrue* until later.

ALJ decisions issued under the 1928 Act, as well as decisions issued by the District of Columbia under the 1982 Act, have concluded that disabilities resulting from employment events that occurred prior to July 26, 1982, are subject to the provisions of the 1928 Act even though such disabilities did not become manifest until after the 1982 Act became effective. *Coward* v. *Peter Kiewit & Sons, Inc.*, OALJ Nos. 85-DCW-38 to -40 (Aug. 30, 1985) (1928 Act); *Pryor* v. *James McHugh Construction Co.*, OALJ No. 85-LHC-114 (Sept. 9, 1985) (1928 Act); *Jones* v. *PEPCO*, H&AS No. 83-182 (Oct. 23, 1985) (1982 Act).

Accordingly, these final rules revise § 701.101(b) to state that the old law applies, not to "injuries or deaths sustained" before its repeal, but to "all claims based on *employment events* before July 26, 1982."